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Supreme Court of the United States

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BRIEF FOR APPELLANT.

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Supreme Court of the United States.

THE WESTERN UNION TELEGRAPH COMPANY, Appellant, vs. PENNSYLVANIA RAILROAD COMPANY and THE UNITED NEW JERSEY RAILROAD AND CANAL COMPANY, Appellees.	No. 367. Oct. Term, 1903.
THE WESTERN UNION TELEGRAPH COMPANY, Petitioner, vs. PENNSYLVANIA RAILROAD COMPANY and THE UNITED NEW JERSEY RAILROAD AND CANAL COMPANY.	No. 199. Oct. Term, 1904.

Although each of the above-entitled causes has its separate record, they really present the same question, and a statement of the manner in which they have been brought to this Court will show that the two records present the record of but one case and the same fundamental legal questions.

No. 367.

This record presents the following proceedings by which the cause is brought to this Court: Upon the bill filed by the Western Union Telegraph Company an application was made in the United States Circuit Court for the District of New Jersey for a preliminary injunction, restraining the defendants from taking certain action respecting telegraph lines of the complainant, pending the hearing and trial of this cause, and the trial of an action at law between the same parties. This preliminary injunction was allowed by Judge KIRKPATRICK, sitting as Circuit Judge. (Record No. 367, pp., 92-96). An appeal was taken from this action of the Circuit Court to the United States Circuit Court of Appeals for the Third Circuit by the defendants. This appeal was argued in the Circuit Court of Appeals. At the same time a writ of error sued out by the Western Union Telegraph Company to the action of the Circuit Court for the Western District of Pennsylvania was heard the two cases being argued together. This error case is No. 368 of the October Term, 1903, in this Court, and was ordered to be heard with these cases.

The writ of error was from a final judgment of the Circuit Court for the Western District of Pennsylvania in an action at law brought by the Western Union Telegraph Company against the Pennsylvania Railroad Company, involving some of the questions presented in No. 367. The appeal in this cause (No. 367) and the writ of error were argued together, and the Circuit Court of Appeals rendered one opinion applicable to both the cases thus argued, and in that opinion

considered the questions presented in the bill in this case as upon a general demurrer, and reached the conclusion "that the fundamental position of the Telegraph Company in each of these cases is untenable."

After this decision of the Circuit Court of Appeals the telegraph company made application to the Circuit Court of Appeals requesting that, inasmuch as the Court had by its opinion determined the merits of the entire controversy in the New Jersey case (No. 367), it would follow the practice adopted in Maas, Foos & Co. vs. Stover Mfg. Co., 89 Fed. Rep., 333, and approved by this Court in the opinion of that case upon *certiorari* to this Court in 177 U. S., 485, by directing the Circuit Court to dismiss the bill for want of equity, in order that the question involved might be brought to this Court for speedy determination, and a form of order for such action was presented. This form of order was objected to by the defendant railway companies, but the Court of Appeals declined to enter it, but adopted the form of order presented by the defendant railway companies, being in form simply a reversal of the order granting a preliminary injunction (Record No. 367, p. 109). Thereupon a petition for appeal to this Court was presented by the telegraph company to Mr. Justice PECKHAM of this Court, and allowed, and the appeal was filed in this Court. At the same time an order was entered to preserve the *status quo* as to the telegraph lines pending the determination of the appeal (Record No. 367, pp. 143, 144).

No. 199.

The record of No. 199 presents the bill filed in the United States Circuit Court for the District of New Jersey in the same cause, the allowance of the preliminary injunction, and the appeal to the Circuit Court of Appeals, as in No. 367.

Immediately before the allowance of the appeal to the Circuit Court of Appeals, application was made by the defendant railway companies to the Judge of the Circuit Court for the District of New Jersey for an extension of time for the defendants to answer the bill of complaint, and their time for answer was extended until 20 days after the entry of the judgment of the Circuit Court of Appeals on the appeal from the order granting a preliminary injunction This was on the 27th of January, 1903 (Record No. 199, p. 107). The opinion of the Circuit Court of Appeals upon said appeal was filed May 19th, 1903 (Record No. 367, p. 109), and the order entered in the Circuit Court of Appeals reversing the action of the Circuit Court in granting the preliminary injunction was entered on the 11th of June, 1903 (Record No. 367, p. 109).

The Western Union Telegraph Company's appeal to this Court in No. 367 was allowed by Mr. Justice PECKHAM on the 17th of June, 1903 (Record No. 367, p. 110).

On the 18th of June the defendant railway companies made an *ex-parte* application to the Circuit Court and obtained further time for filing pleas or answers to the bill of complaint in the Circuit Court in No. 367 until forty days after the determination of the

appeal of the Western Union Telegraph Company in the Supreme Court of the United States and the return of the record to the Circuit Court. Thereafter the Western Union Telegraph Company filed a motion to vacate the order of June 18th, giving the defendants this additional time to answer, upon the ground that the same had been improvidently granted. Upon the hearing of that motion in the Circuit Court, that Court, in view of the determination by the Circuit Court of Appeals of the questions presented by the bill, and particularly in view of the conclusion of the Circuit Court of Appeals expressed in its opinion that the bill of complaint was wholly without equity, considered it unnecessary and undesirable that the cause should proceed further, and, accordingly, *sua sponte*, decreed a dismissal of the bill of complaint at the cost of the complainant (Record No. 199, p. 110). Thereupon, in open court, the telegraph company prayed an appeal to the Circuit Court of Appeals, which was allowed, upon its entering a bond in the sum of $250, which was immediately done, and the appeal perfected (Record No. 199, p. 111). Thereupon the record was filed in the Circuit Court of Appeals.

While this appeal was pending in the Circuit Court of Appeals, and before it was argued in that court, a petition for writ of *certiorari* was filed in this court by the telegraph company reciting the history of the previous appeal in the same cause, and also the pendency of the appeal in the Circuit Court of Appeals, and asking that the record of the later appeal in the Circuit Court of Appeals should be certified to this Court, to be heard with the appeal already pending in this Court. This petition for writ of *certiorari* was

granted, following the practice approved in Pullman Car Company vs. Central Transportation Co., 171 U. S., 138.

We do not deem it necessary to discuss the questions of practice involved in taking the appeal in No. 367, the first of the above-entitled causes, nor as to the right of this Court to bring the record in No. 199 into this Court by *certiorari*, for the reason that the allowance of the latter writ brings the whole case into this Court, and we conceive that no question can now be made as to the fact that the whole case is in this Court for consideration upon the merits of the controversy between the parties as presented in the bill filed in the United States Circuit Court of New Jersey.

The Questions.

The questions presented upon the merits of the controversy are, as shown by the assignment of errors in the Circuit Court, as follows:

First. That the Court erred in ordering the dismissal of the bill therein.

Second. That the Court erred in holding and decreeing that the bill of complaint is without equity (Record No. 199, p. 111).

Nature of Bill.

The bill in equity filed in the United States Circuit Court of New Jersey (No. 199, pp. 1–16) sets forth the incorporation of the United New Jersey Railroad and Canal Company, the owner of the lines of railway de-

scribed, which were constructed and are maintained under certain acts of the State of New Jersey, which are set forth in paragraph 4 of the bill, from February 4, 1830, down to March 27, 1873. The early statutes incorporating the various companies are referred to by title and date of passage, and are material in some aspects, to which we may call attention later, but primarily and principally because they expressly provide that the roads of railway companies incorporated under those acts should be, and always remain, public highways (Record, 199, p. 4).

The bill further shows that, since the year 1851, the appellee has been engaged in the business of constructing and operating telegraph lines in the State of New York and adjoining States and has, as such telegraph company, acquired and constructed a system of telegraph lines extending throughout all the States and Territories of the United States and connecting with the submarine cables and land lines of other countries, the system operated directly by the telegraph company consisting of over 192,000 miles of poles and cables and over 900,000 miles of wire, and that a material portion of such system consists of the telegraph lines situated along and upon the railways of the defendant companies, which have been constructed and in operation for more than 40 years.

The bill further shows that since the 20th of September, 1881, these lines of telegraph have been operated and maintained under the provisions of a contract between the Pennsylvania Railroad Company, the lessee since 1873 of the said lines of railway and the appellant, a copy of which contract is attached and set forth as part of the bill. The bill sets forth that since the date named in the said contract for its term, to

wit, September 20th, 1901, the said contract was carried out and payments made thereunder, as shown by exhibits attached, monthly, the last payment being made on the 20th of June, 1902, and that on the 15th of May the defendant presented a notice requiring the removal of all the poles, wires and telegraph property of the appellant within six months from the 1st of June, 1902, and in default of compliance with the requirements of the notice, that the railway company would itself cause the said poles and wires and other property of the telegraph company to be removed at the expense of the latter. The bill sets forth that the said lines of telegraph have been at all times maintained, and can continue to be maintained and operated along the said lines of railway without interference with the operation and maintenance by the said railway or the ordinary travel upon the said railway, subject only to such slight changes in the location of some of the poles from time to time as the shifting of tracks or construction of new tracks may require, as in times past.

Following the notice of the 15th of May, certain correspondence was conducted between the telegraph company and the Pennsylvania Railroad Company, in which the former sought a conference with the latter for the purpose of adjusting and agreeing upon the compensation for the continued maintenance and operation of its telegraph lines along and upon the right of way of the said railroad companies, but the Pennsylvania Railroad Company absolutely refused to negotiate with the telegraph company for the continued use and occupation of the railways. The bill sets forth that the notice and requirement of removal of the said telegraph lines of the appellant is not because of any necessity of the defendant

railroad company, but is in order to allow the railroad company to install another telegraph company in the same space, and construct, maintain and operate telegraph lines in substantially the same manner as the complainant has maintained and operated them.

The bill sets forth the provisions of the Act of Congress approved July 24th, 1866, and the telegraph company's compliance with all the provisions, requirements, and obligations of the said act, and the transmission of a large amount of business over said lines for the Government of the United States at rates fixed by the Postmaster-General, in accordance with the provisions of said Act of Congress; it sets forth the provisions of the Act of Congress, making this and all other railroads in the United States and all letter-carrier routes, post-roads, and all public roads and highways post-roads. It sets forth further that, under the provisions of the said Act of Congress and under the provisions of the statutes of New Jersey, the said lines of railway are subject to the right and privilege of the telegraph company to construct, maintain and operate its telegraph lines over and along the said railways subject to the sole condition of not interfering with the ordinary travel upon said railways and also of compensating the said defendant railway companies for such use of said right of way, and sets up the fact that in an action at law instituted in the United States Circuit Court for the District of New Jersey the appellee had set forth its rights under the said Act of Congress and was seeking to have adjudicated and determined the amount of compensation which it would be required to pay to the said defendant companies for the right thus

to maintain and operate its telegraph lines along and upon the said railways. Pending the determination of the said equity cause (No. 367) and of the said suit at law, it asked a preliminary injunction restraining the defendant companies from interfering with the location, construction, maintenance, and operation of its lines of telegraph upon the roadway or right of way of the defendant companies' railways.

Upon this appeal, the first question we argue is this:

1. Has complainant a right under the Act of Congress of July 24, 1866, either alone, or in conjunction with certain provisions of the statute of New Jersey, to maintain this suit in equity or its action at law to have fixed the amount of compensation which it should pay to the defendants for the right to continue to maintain and operate its line of telegraph along and upon the defendants' railways? This the Circuit Court of Appeals in its opinion and the Circuit Court in its decree dismissing the Bill of Complaint denied and our contention will be that such a right exists.

ARGUMENT.

The Western Union Telegraph Company had the right to continue to occupy the lines of railway of the defendants under the provisions of the Act of Congress of July 24, 1866, and to have the compensation therefor to the defendant railway companies for so doing judicially ascertained.

The Act of Congress is entitled "AN ACT TO AID IN THE CONSTRUCTION OF TELEGRAPH LINES AND TO SECURE TO THE GOVERNMENT THE USE OF THE SAME FOR POSTAL, MILITARY AND OTHER PURPOSES."

Inasmuch as this act will be continuously referred to and relied upon throughout this brief, we here set forth the original act in its original four sections:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any telegraph company now organized or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States which have been or may hereafter be declared such by Act of Congress, and over, under, or across the navigable streams or waters of the United States: *Provided*, That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel of such military or post-roads. And any of said companies shall have the right to take and use from such public lands the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of said lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption, through which its

said lines of telegraph may be located, as may be necessary for its stations, not exceeding 40 acres for each station; but such stations shall not be within 15 miles of each other.

"SEC. 2. *And be it further enacted*, That telegraphic communications between the several departments of the Government of the United States and their officers and agents, shall in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster-General.

"SEC. 3. *And be it further enacted*, That the rights and privileges hereby granted shall not be transferred by any company acting under this Act, to any other corporation, association, or person: *provided, however*, That the United States may at any time after the expiration of five years from the date of the passage of this Act, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all of said companies at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the company interested, and one by the four so previously selected.

"SEC. 4. *And be it further enacted*, That before any telegraph company shall exercise any of the powers or privileges conferred by this Act, such company shall file their written acceptance with the Postmaster-General of the restrictions and obligations required by this Act."

Stats. at Large, Vol. .

Legislation enacted many years prior to the passage of this act had declared all railroads to be post roads.

The following is Section 2 of the Act approved July 7, 1838:

"SEC. 2. *And be it further enacted*, That each and every railroad within the limits of the United States which now is, or hereafter may be made and completed, shall be a post route, and the Postmaster-General shall cause the mail to be transported thereon, provided he can have it done upon reasonable terms, and not paying therefor in any instance more than twenty-five per centum over and above what similar transportation would cost in post coaches."

Vol. 5, Stats. at Large, 283.

Section 3 of a subsequent Act, approved March 3, 1853, was as follows :

" SEC. 3. *And be it further enacted*, That all railroads and parts of railroads which are now or hereafter may be in operation, be, and the same are hereby, declared to be post-roads ; and the Postmaster-General may contract for carrying the mails thereon according to existing laws."

Vol. 10, Stats. at Large, 255.

These acts had not been repealed in 1866, nor have they been since.

By a subsequent act approved June 8th, 1872 (now Section 3964, Rev. Stats.), it is provided as follows :

" SEC. 3964. The following are established post roads : * * * All railroads or parts of railroads which are now, or hereafter may be in operation. * * * All letter carrier routes established in any city or town for the collection and delivery of mail matters."

By act approved March 1st, 1884, it is provided :

" That all public roads and highways while kept up and maintained as such are hereby declared to be post routes."

Vol. 23, Stats. at Large, 3.

The true construction of the provisions of the Act of July 24, 1866, is the fundamental question underlying the Bill filed in this case.

The contention of the Western Union Telegraph Company is that there is necessarily implied in the provisions of that act the right of construction, maintenance, and operation of lines of telegraph along any of the military or postroads within the limits of the United States, upon the payment of just compensation to the owners of such post roads. The further contention is that under

the general principles of law as well as under the decisions of this Court the determination of the amount of such compensation may be had in the Courts of the United States precisely as any other question in dispute between parties litigant.

The contention of the Pennsylvania Railroad Company and its co-defendant in the lower Courts was that all that is granted by this statute is:

1. Consent by the Government of the United States to any telegraph company accepting the provisions of the act, to construct lines over the public domain of the United States, and over and along military and post-roads owned by the United States, and across the navigable streams, and waters of the United States.

2. An assent by Congress generally to railway companies owning post-roads, to make any necessary arrangements with any telegraph company which has accepted the provisions of the act, but no obligation on the railway company to allow the telegraph company to occupy its right of way even upon payment of compensation; and

3. That the act prevents any hostile State legislation.

This is the definition of the meaning of the act contended for in the brief of the Pennsylvania Railroad Company filed in the Court below, and, therefore, we may assume that it will be the position taken upon this appeal respecting the meaning of this act.

The question which we have for consideration is, which of these meanings, in the light of sound principles and of such decisions as this Court and other Federal Courts have made, and in view of the pro-

visions and purpose of the act itself, is the correct one?

Decisions in this Court as to the Act of July 24, 1866.

We shall take up first the decisions which this Court has made bearing either directly or indirectly upon this question and consider what principle is decided in each of these cases and then consider the broad principles that should apply to an act of this character.

Pensacola Case.

(October, 1877.)

The act first came before this Court for consideration in the case of Pensacola Telegraph Company against the Western Union Telegraph Co. (96 U. S., 1) upon an appeal from the Circuit Court of the United States for the Northern District of Florida. The question arose in this form: The State of Florida, in December, 1866, passed an act incorporating the Pensacola Telegraph Co., and granting it the sole and exclusive privilege and right of

"establishing and maintaining lines of electric telegraph in the Counties of Escambia and Santa Rosa, either from different points in said counties or connecting with lines coming into said counties, or either of them, from any point in this State (Florida) or any other State."

In 1872 the Pensacola and Louisville R. R. Co. acquired the property of a Florida railroad company which was within the territory embraced by the exclusive grant to the Pensacola Telegraph Company,

and in June, 1874, the Pensacola and Louisville R. R. Co. granted to the Western Union Telegraph Co. the right to erect a telegraph line along and upon its right of way within the State of Florida. The Western Union Telegraph Company, in June, 1867, had duly accepted all the provisions and obligations of the Act of July 24, 1866, by filing its written acceptance with the Postmaster-General. Immediately after making the arrangement with the railroad company the Western Union commenced the erection of its line of telegraph along the right of way of the Pensacola and Louisville Railroad Company. The Pensacola Telegraph Company had its lines along this railway, and the railway was within the territory prohibited by the Act of Florida of 1866. Thereupon the Pensacola Company filed its bill in the Circuit Court of the United States for the Northern District of Florida to enjoin the construction and use of this line, basing its right to an injunction upon the exclusive grant to the complainant from the Legislature of Florida. Upon the hearing a decree was entered dismissing the bill, and an appeal was taken by the Pensacola Company to the Supreme Court of the United States.

The fundamental question in the case was as to the extent of the power of Congress under the sections of the Constitution, giving it power to regulate commerce with foreign nations and among the several States, and to establish post-offices and post-roads, as against legislation of the State of Florida granting the exclusive privilege to the Pensacola Telegraph Company. As is evident from the foregoing statement, the question was whether the legislation of Florida granting the exclusive right to the Pensacola Telegraph Company, or the Act of Con-

gress of July 24, 1866, was paramount. After deciding and passing upon this question, which was decisive of the whole case, and in favor of the power of Congress upon this subject, Chief Justice WAITE proceeds (in a paragraph which will be quoted by our opponents, and which is relied upon as a decision of the meaning and extent of the Act of July 24, 1866) to say:

"To this extent, certainly, the statute is a legitimate regulation of commercial intercourse among the States, and is appropriate legislation to carry into execution the powers of Congress over the postal service. It gives no foreign corporation the right to enter upon private property without the consent of the owner and erect the necessary structures for its business; but it does provide that, whenever the consent of the owner is obtained, no State legislation shall prevent the occupation of post-roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges.

"It is insisted, however, that the statute extends only to such military and post-roads as are upon the public domain; but this, we think, is not so. The language is, 'Through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States, which have been or may hereafter be declared such by Act of Congress, and over, under or across the navigable streams or waters of the United States.' There is nothing to indicate an intention of limiting the effect of the words employed, and they are, therefore, to be given their natural and ordinary signification. Read in this way, the grant evidently extends to the public domain, the military and post-roads, and the navigable waters of the United States. These are all within the dominion of the national government to the extent of the national powers, and are, therefore, subject to legitimate congressional regulation. No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceed-

ings are authorized. State sovereignty under the constitution is not interfered with. Only national privileges are granted."

The phase of the question which is now under consideration was not discussed by counsel, for the reason that the question of the right of the Western Union to construct, maintain, and operate its lines of telegraph lines upon the property of the Pensacola and Louisville Railroad as against the owner of the railroad, was not involved in the case. The Western Union Telegraph Company had made arrangements with the railroad company for the occupation of its right of way, and whether or not it had the right to be upon the railroad without the consent of the railroad company could not have been argued, and the reasons therefor presented to the Court, because such right was in no wise involved in the case, which was presented, and the briefs show that this question was not alluded to therein. The sole question was, whether, having obtained that right by private contract with the railroad company, so far as the railroad company could give it, the Legislature of Florida could prohibit it from exercising the right in a given territory in the face of the provisions of the Act of Congress.

Ann Arbor Case.

(May 21, 1900.)

The next case in which it will be claimed this Court has held adversely to the claim of the Telegraph Company upon the construction of this Act of Congress is the case of the Western Union Telegraph Co. vs. Ann Arbor R. R. Co. (178 U. S., 239), and it is important

to take note of the manner in which this case came into the Supreme Court.

The suit was originally instituted in the Circuit Court of Benzie County, State of Michigan, by the Western Union Telegraph Company, alleging that on the 25th of September, 1890, it entered into a contract with the Frankfort and Southeastern Railroad Company for the construction and maintenance of a telegraph line along the said railroad, for the period of twenty-five years from the date of the contract; that, in pursuance of this contract, it built telegraph lines along the railroad for the joint use of the railroad company and the complainant, and that those wires have been in constant use by the two parties from the date of their erection; that in 1892 the railroad was sold to the Toledo, Ann Arbor and North Michigan Railroad Company, and thereafter the whole road, upon default in mortgages, was sold under order of the Court and conveyed to the defendant the Ann Arbor Railroad Company, and that the officers of the Ann Arbor Railroad Company, who were named, were familiar with the terms of the contract of the 25th of September, 1890, with the Frankfort and Southeastern Railroad Company; that the Ann Arbor Railroad Company claimed not to be bound by the contract, and had given written notice to the complainant to that effect. Then follow the following paragraphs of the bill:

"6th. Your orator is now and long has been doing an extensive telegraph business in many parts of the United States. On January 7th, 1867, it filed with the Postmaster General its acceptance of the provisions of the act of the United States, passed July 24, 1866.

"7th. It avers that the provisions of the contract with said Frankfort and Southeastern Railroad Company are binding on said Ann Arbor Company, and that

independent of said contract it has a right to maintain its telegraph line on what was formerly said Frankfort and Southeastern Railroad under the provisions of the statute of the United States."

Then, after averring that the Ann Arbor Railroad Company was taking possession of said wires and depriving the complainant of their use, and setting forth the value of the wires and that the damage arising from the loss of business would be large and incapable of accurate calculation, and that subsequent to the date of the taking possession of them by the defendant, the complainant had reconnected its lines, it asked for an injunction in the following prayer:

"To the end that said defendant, the Ann Arbor Railroad Company may answer this bill, but not under oath, answer under oath being hereby expressly waived, and that an injunction both preliminary and final may be issued out of and under the seal of this court, commanding the said Ann Arbor Railroad Company and all its officers and agents to absolutely desist and refrain from in any way interfering with the rights of complainant as alleged in this bill in the telegraph wires and poles running from Thompsonville to Frankfort, or its possession of the same, and that said defendant allow said complainant to reconnect said wires to its main line on the Chicago and West Michigan railroad, and to use said wires for its telegraph business in the same way as it was accustomed to use them before its rights were disturbed by said defendant, and that defendant be required to carry out said contract in good faith and for such other and further or different relief, or both, as may be agreeable to equity and good conscience."

Upon this bill thus framed summons was issued and served. The *defendant*, upon coming into court, filed its petition and bond, asking for the removal of the cause to the Federal Court, alleging that the plaintiff was a corporation organized under the laws of New York and is a citizen of the State of New York,

and that the defendant, the Ann Arbor Railroad Company, was a corporation organized under the laws of the State of Michigan and a citizen of said State, and as ground for removal

"that this suit is one arising under the Constitution and laws of the United States, and especially under the Act of Congress of July 24, 1866, now contained in Section 5263 of the Revised Statutes of the United States and the amendments thereto."

Upon this petition, the cause was removed, and thereupon in the Federal Court the defendant filed an answer setting forth the execution of a mortgage by the Frankfort and Southeastern Railroad Company long prior to the making of the contract of September 25th, 1890, and the issue of a large amount of bonds thereunder, and that the foreclosure and sales referred to in the complaint by means of which the defendant railroad company became the owner of the property were had under this prior mortgage, and that the prop- was sold for an amount insufficient to pay the indebtedness secured by said mortgage. Thereafter the railroad company filed a cross-bill which is material only in that it repeats some of the statements relating to the creation of this first mortgage, and asks that the contract be canceled, and held for naught and that an accounting may be had between the parties as to their respective interests and rights in and to the property in view of the contributions which had been made by the parties respectively, and that the Western Union Telegraph Company may be forbidden to interfere with the railroad company's interests in the telegraph lines. Thereafter a stipulation as to the facts was made, by which it was agreed that the statements in the answer respecting the execution and delivery

of the mortgage, and the foreclosure and sale under the prior mortgage are true. It was also stipulated that the statement of the bill respecting the reconnection of the telegraph lines with the other lines of the Western Union Telegraph Company after they had been cut and severed by the defendant, the railroad company, are true ; also that the above parties had been using and operating said lines of telegraph in substantially the same method provided by the contract in suit since the reconnection ; also that both parties had complied with the terms of the contract, and that the defendant company had bought with full knowledge of the rights and claims of the complainant under this contract with the Frankfort and Southeastern Railroad Company, and that, if the value of the telegraph line in controversy became material, evidence might be taken, and that this case might be submitted to the Court for final decree upon the pleadings, and this stipulation as to facts.

Upon this stipulation as tofacts Judge SEVERENS, to whom the case was submitted, found that the contract was a mere personal contract between the Western Union and the Frankfort and Southeastern Railroad Company ; that it was terminated by the foreclosure of the prior mortgage, and did not become a charge upon the defendant because of its purchase of the railroad upon the foreclosure of the mortgage, unless by some further agreement, the Ann Arbor Railroad Company voluntarily became a party to the agreement ; that, being a meer personal contract, it was terminated by the foreclosure of the prior mortgage, and that the telegraph company had a right to remove the personal property which, by the terms of the contract, was to

belong to it, and which was placed upon the property of the Ann Arbor Railroad Company. An appeal was taken from this decree to the Circuit Court of Appeals, which sustained the contention of the railroad company that the foreclosure of the prior mortgage terminated the contract, and affirmed the decree below. Thereupon the telegraph company took an appeal to the Supreme Court of the United States.

When it came into the Supreme Court, that court *sua sponte*, raised the question as to whether the suit as brought by the telegraph company in the State Court, presented upon the bill filed, a right under the Constitution and laws of the United States, as averred in the railroad company's petition for removal, and respecting this Chief Justice FULLER says:

"Defendant's application to remove, therefore, was based on the averment that the suit arose 'under the Constitution and laws of the United States.' Whether it did so arise depended on complainant's statement of its own case. Tennessee v. Bank, 152 U. S., 454. And the sixth and seventh paragraphs of the bill contain all that defendant could have relied on as bringing the case within that category. These paragraphs were to the effect that complainant had accepted the provisions of the Act of Congress of July 24, 1866, and that independent of the contract it had 'a right to maintain its telegraph line on what was formerly said Frankfort & Southeastern Railroad under the provisions of the statute of the United States."

"The bill was in legal effect a bill for the specific performance of the contract set up in the pleadings and the prayer was for an injunction against interference with complainant's alleged rights, and that defendant allow complainant to reconnect its said wires, and use them in the same way as before they were disturbed by the defendant, 'and that defendant be required to carry out said contract in good faith' and for general relief."

Then follows the paragraph which is relied upon by our opponents, viz:

"It was not argued by counsel for the telegraph company that the telegraph company had any right under the statute and independently of the contract, to maintain and operate this telegraph line over the railroad company's property; and it has been long settled that that statute did not confer on telegraph companies the right to enter on private property without the consent of the owner, and erect the necessary structures for their business; 'but it does provide that, whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post-roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges.'" *Pensacola Telegraph Company vs. Western Union Telegraph Company*, 96 U. S., 1. In that case Mr. Chief Justice WAITE further said:

"No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized."

Then recurring to the question whether the bill of the Telegraph Company did set forth a dispute or controversy under the Constitution or Laws of the United States as required in good pleading, and concluding that paragraphs six and seven of the bill (quoted *ante*), did not meet this requirement, and that such meaning was not intended by the pleader, the Chief Justice says:

"As we have said, it was not asserted in argument that the telegraph company had the right independently of the contract to maintain its line on the railroad company's property, and in view of the settled construction of the statute, we could not permit such a contention to be recognized as the basis of jurisdiction. But it was argued that by virtue of the statute

the telegraph company was possessed of a public character and was discharging public duties, and that although the interest it acquired by its contract was subject to the prior mortgage, it could not be absolutely deprived thereof by foreclosure, but that the Circuit Court should have so framed its decree as to preserve the occupancy of the telegraph company, subject to making compensation to the railroad company, the value of the alleged easement to be ascertained by the Court. It is sufficient to say that the bill was not framed in that aspect, and though there was a prayer for general relief, relief cannot be awarded under that prayer unless it is such relief as is agreeable to the case made by the bill. And it is entirely clear that there were no averments in the bill in respect of this contention which would bring the case within the category of cases arising under the Constitution or laws of the United States so that jurisdiction could be held to have rested on that ground."

Therefore the decree was that the decree of the Circuit Court of Appeals and of the Circuit Court should be reversed and the cause remanded to the Circuit Court with direction to remand it to the State Court.

Inasmuch as the decision of the Court was to the effect that the bill was one for the specific performance of the contract set up in the bill and inasmuch as no case was stated in the bill under the Act of Congress of July 24, 1866, nor attempted to be so stated, it is clear that the decision of the Supreme Court of the United States was simply that it was without jurisdiction to hear and determine the case because the removal of the case from the State Court was not justified by any provision of law.

Postal Telegraph and Cable Co. vs. Cleveland, &c., Railroad Co.

The case of Postal Telegraph and Cable Company vs. Cleveland, &c., Railroad Company (94 Fed. Rep., 234) will also probably be relied upon as a direct decision under the Act of July 24, 1866, in support of the railroad company's contention; but it is to be noted that this decision proceeds entirely upon the basis of Chief Justice WAITE'S statement in Pensacola Telegraph Co. vs. Western Union Telegraph Co. (*supra*) and does not attempt to add anything to that case, but first construing the dictum of Chief Justice WAITE to mean that the right of way of a railroad company was comprehended in the phrase "private property," and that the Act of 1866 did not authorize the compulsory acquisition of "private property," Judge RICKS accepts the dictum as a binding adjudication, and therefore the decision adds nothing to the force of the argument for this Court.

Telegraph Co. vs. Texas.

(Oct., 1881.)

The cases which assert, or, in their logic, necessarily imply a different doctrine, are numerous. Very shortly after deciding the case of Pensacola Telegraph Company vs. Western Union Telegraph Co., Chief Justice WAITE announced the opinion of this Court in the case of Telegraph Company vs. Texas, 105 U. S., 460. This was a case involving the right of the State of Texas to impose a tax upon messages sent by the Western Union Telegraph Company from Texas into other

States and Territories, and this Court through Mr. Chief Justice WAITE held this doctrine as applicable to telegraph companies:

"A telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods. Both companies are instruments of commerce and their business is commerce itself. They do their transportation in different ways, and their liabilities are in some respects different, but they are both indispensable to those engaged to any considerable extent in commercial pursuits.

"Congress, to facilitate the erection of telegraph lines has by statute, authorized the use of the public domain and the military and post-roads, and the crossing of the navigable streams of the United States for that purpose. As a return for this privilege, those who avail themselves of it are bound to give the United States precedence in the use of their lines for public business, at rates to be fixed by the Postmaster General. Thus, as to government business, companies of this class become government agencies.

"The Western Union Telegraph Company, having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a government agent for the transmission of messages on public business. Its property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business."

The Court held that the State tax, so far as it was a tax on interstate messages and on government messages was absolutely void.

To same effect are following cases:

Ratterman vs. W. U. Telgh. Co., 127 U. S., 411.

Leloup vs. Mobile, 127 U. S., 640.

W. U. Telgh. Co. vs. Alabama, 132 U. S., 473.

Telegraph Co. vs. Massachusetts
(March 19, 1888.)

In 125 U. S., 530, the question of the effect of the Act of Congress came again before this Court, in the case of Western Union Telegraph Company vs. Attorney-General of the Commonwealth of Massachusetts, in which Mr. Justice MILLER delivered the opinion of the Court. This case raised the question as to the validity of a system of State taxation by which the value of the property owned and used by the telegraph company within the State of Massachusetts was ascertained by comparing the length of its lines in that State with the length of its entire lines and taking the mileage proportion of the value of the entire lines. It was claimed that this was in effect a taxation upon the Federal franchise which had been given to the telegraph company by the Act of Congress of July 24, 1866, and was in violation of the rights conferred upon that company by that act; that it had the right to exercise its functions of telegraphing over such portions of its lines as are located upon the military and post-roads of the United States, without being subject to taxation therefor by the State authorities. Answering this contention and upholding the right of the State to tax, Mr. Justice MILLER said:

"*While the State could not interfere by any specific statute to prevent a corporation from placing its lines along these post-roads or stop the use of them after they were placed there,* nevertheless the company receiving the benefit of the laws of the State for the protection of its property and its rights is liable to be taxed upon its real and personal property as any other person would be. It never could have been intended

by the Congress of the United States in conferring upon a corporation of one State the authority to enter the territory of another State and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support. * * *

"*This authority of the Government gives to this telegraph company, as well as to others of a similar character who accept its provisions, the right to run their lines over the roads and bridges which have been declared to be post roads of the United States.*"

Then after upholding the tax because, although nominally upon the shares of the capital stock of the company, yet it was in reality upon the property owned and used by it in the State of Massachusetts, he comes to consider an injunction which had been granted in the case in the Court below against the operation of the lines because of the non-payment of the tax, such injunction being the method prescribed by the statutes of Massachusetts, for the enforcement of the tax which the Court had held valid. As to this he says :

"The effect of this injunction, if obeyed, is utterly to suspend the business of the telegraph company, and defeat all its operations within the State of Massachusetts. The act of Congress says that the company accepting its provisions 'shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States.' It is found in this case that 2334.55 of the company's lines out of 2833.05 on which this tax is assessed are along and over such post-roads, and of course the injunction prohibits the operation of the defendant's telegraph over these lines, nearly all it has in the State.

"If the Congress of the United States has authority to say that the company might construct and operate its telegraph over these lines, as we have repeatedly

held it had, the State can have no authority to say it shall not be done. The injunction in this case, though ordered by a Circuit Court of the United States, is only granted by virtue of sec. 54 of chapter 13 of the Public Statutes of Massachusetts. If this statute is void, as we think it is, so far as it prescribes this injunction as a remedy to enforce the collection of taxes by the decree of the court awarding it, the injunction is erroneous.

"In holding this portion of section 54 of chapter 13 of the Massachusetts to be void as applicable to this case, we do not deprive the State of the power to assess and collect the tax. If a resort to a judicial proceeding to collect it is deemed expedient, there remains to the court all the ordinary means of enforcing its judgment—executions, sequestration and any other appropriate remedy in chancery."

St. Louis Case.

(March 6, 1893.)

The Supreme Court of the United States had occasion to consider the Act in another phase in St. Louis vs. Western Union Telegraph Co. (148 U. S., 92). The question arose under an ordinance requiring every telegraph company within the city to pay for each pole occupying the streets of the city the sum of five dollars per annum for the privilege of using the streets, alleys and public places. Suit was brought to recover the sum of $22,000 for poles of the Western Union Telegraph Company located upon the streets. The case was tried in the Circuit Court without a jury, and judgment was rendered in favor of the defendant, the Court holding that the burden was a tax which the city had no authority to impose; and the City by writ of error brought the case to the Supreme Court of the United States. In the opinion Justice BREWER thus

considers the rights of the telegraph company under the Act of Congress of July 24, 1866:

"It is a misconception, however, to suppose that the franchise or privilege granted by the act of 1866 carries with it the unrestricted right to appropriate the public property of a State. It is like any other franchise, to be exercised in subordination to public as to private rights. While a grant from one government may supersede and abridge franchises and rights held at the will of its grantor, it cannot abridge any property rights of a public character created by authority of another sovereignty. No one would suppose that a franchise from the Federal government to a corporation, State or national, to construct interstate roads or lines of travel, transportation or communication, would authorize it to enter upon the private property of an individual, and appropriate it without compensation. No matter how broad and comprehensive might be the terms in which the franchise was granted, it would be confessedly subordinate to the right of the individual not to be deprived of his property without just compensation. And the principle is the same when, under the grant of a franchise from the national government, a corporation assumes to enter upon property of a public nature belonging to a State. It would not be claimed, for instance, that under a franchise from Congress to construct and operate an interstate railroad the grantee thereof could enter upon the state-house grounds of the State, and construct its depot there, without paying the value of the property thus appropriated. Although the state-house grounds be property devoted to public uses it is property devoted to the public uses of the State, and property whose ownership and control are in the State, and it is not within the competency of the national government to dispossess the State of such control and use, or appropriate the same to its own benefit, or the benefit of any of its corporations or grantees, without suitable compensation to the State. This rule extends to streets and highways; they are the public property of the State. While for the purposes of travel and common use they are open to the citizens of every State alike, and no State can by its legislation deprive the citizens of another State of such common use, yet when an appropriation of any part of this public property to an exclusive use is sought, whether by a citizen or corpora-

tion of the same or another State, or a corporation of the national government, it is within the competency of the State, representing the sovereignty of that local public to exact for its benefit compensation for this exclusive appropriation. It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the State may, if it chooses, exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated " (p. 101).

Considering the question of the amount fixed by the ordinance which was claimed to be unreasonable, unjust and excessive, the justice observes further by way of conclusion :

" Indeed it may be observed, in the line of the thoughts heretofore expressed, that this charge is one in the nature of rental; *that the occupation by this interstate commerce company of the streets cannot be denied by the city; that all that it can insist upon is in this respect reasonable compensation for the space in the streets thus exclusively appropriated; it follows in the nature of things that it does not lie exclusively in its power to determine what is reasonable rental. The inquiry must be open in the Courts, and it is an inquiry which must depend largely upon matters not apparent upon the face of the ordinance, but existing only in the actual state of affairs in the city* " (p. 104).

The question was brought before the Court again upon re-hearing of the same case of St. Louis vs. Western Union Telegraph Co. (149 U. S., 465), and this Court, speaking through Justice BREWER, re-asserted the right of the city to secure reasonable compensation for the *property* which is occupied by the telegraph company by reason of the fact that under the peculiar provisions of the Constitution of Missouri, constituting the City of St. Louis to a certain extent an *imperium in imperio*, the City of St. Louis was the owner of the streets, and as such entitled to control and regulate

their use; and, therefore, the language used in 148 U. S., in the decision of the case, and cited *ante*, is properly applicable to the City of St. Louis, as the City stands in place of the State as the owner of such public property. The essential feature, however, of the decision, to wit: the proposition that the State or the City, although the owners of the street or highway, cannot deny the occupation thereof by a telegraph company vested with the powers conferred in the Act of July 24, 1866; that all they can insist upon as against such occupation by the telegraph company is reasonable compensation for the space in the streets occupied, or exclusively appropriated by the telegraph company; and that, in the determination of the amount of the reasonable rental or compensation for the space thus occupied, the judgment of the city or state is not final, but the question of amount of compensation is one for the courts, is reaffirmed.

This however is only another form of words for expressing the result of an appropriation of the property rights of the city in its streets by the exercise of the right of Eminent Domain and that if the parties differ, the Courts must under the Act of 1866, determine what is a reasonable rental or compensation. An appropriation is only an enforced sale in which appeal is made to the courts to settle the price of the property purchased by the State against the will of its owners. Upon the question of the taking and its propriety the legislative decision to take the property is conclusive (Boom Co. vs. Patterson, 98 U. S., 403). Upon the question of compensation neither the decision of the legislature nor of the owner of the prop-

erty is final. That is a judicial question which the Courts are alone competent to decide.

Monongahela Navigation Co. vs. United States, 148 U. S., 312, 327.

Charles River Bridge vs. Warren Bridge, 11 Pet., 420, 571.

Union Pacific Case

(Nov. 18, 1895).

The court had occasion again to consider the meaning of the Act of July 24, 1866, in the case of the United States vs. Union Pacific Ry. Co. and the Western Union Telegraph Co. (160 U. S., 1). This was a suit brought by the United States against the Union Pacific Ry. Co. under the provisions of the act approved August 7, 1888, amendatory and supplemental of the charter of that company requiring the subsidized Pacific railroad companies to operate their own telegraph lines by their own employees, and requiring the Attorney-General of the United States to institute proceedings to set aside all contracts which would interfere with the operation by the railroad companies of their own telegraph lines in accordance with the provisions of the amendatory and supplemental Act. Among the contracts thus involved was a certain contract of October 1st, 1866, under which the Western Union Telegraph Company had constructed telegraph lines along the railroad from Kansas City to Denver, which contract was claimed to be fully justified by the provisions of an act approved July 2, 1864, known as " the Idaho Act," and respecting the construction and effect of which Mr. Justice HARLAN says :

" If, however, it be contended that this is not the correct interpretation of the Idaho Act, upon what

ground can it be claimed that any arrangement could be made under the Idaho Act, after the passage of the Act of July 24, 1866, that was inconsistent with the latter Act? *Can it be said that, after the passage of the Act of 1866, and while it was in force, a railway company operating a post road of the United States could, by any form of agreement, exclude from its roadway a telegraph company which had accepted the provision of that act? These questions can be answered only in one way, namely, that every railroad company operating a post-road of the United States, over which commerce among the States is carried on, was inhibited, after the Act of July 24, 1866, took effect, from making any agreement inconsistent with its provisions or that tended to defeat its operation. The object of that Act was not only to promote and secure the interests of the Government, but to obtain for the benefit of the people of the entire country every advantage in the matter of communication by telegraph which might come from competition between corporations of different States.* It was very far from the intention of Congress by any legislation to so exert its power as to enable one telegraph corporation, Federal or State, to acquire exclusive rights over any post-road, especially one for the construction of which the aid of the United States had been given, and the use of which was, to some extent, under the control of the National Government" (p. 44).

Then, after the consideration of some other contracts he says, at page 49:

"And we may add what has been said in reference to the prior agreements of 1866, 1869 and 1871, namely, *that no railroad company operating a post road of the United States over which interstate commerce is carried on, can, consistently with the Act of July 24, 1866, bind itself by agreement to exclude from its roadway any telegraph company incorporated under the laws of a State, which accepts the provisions of that Act, and desires to use such roadway for its line in such manner as will not interfere with the ordinary travel thereon.*"

Conclusions from Foregoing Cases.

These decisions definitely establish certain clear and incontestable principles as to the application and meaning of this Act of July 24, 1866. They decide:

1. That the telegraph company accepting the provisions of this act is a direct agency of the Government of the United States and is also "an instrument of foreign and interstate commerce" (Telegraph Co. vs. Texas; Pensacola Case, *supra*, Massachusetts Case, *supra*).

2. That the post-roads of the United States are made subject to occupation and use by such telegraph company as such public agency of the Government of the United States by this act of Congress (Pensacola Telegraph Co. vs. Western Union Telegraph Co.).

3. That the owner of such post-road cannot arbitrarily prohibit the occupation and use by such telegraph company under the conditions and restrictions named in the act, but such owner is entitled to reasonable compensation for the property ar the use of the property which is occupied, and cannot arbitrarily exclude the telegraph company from such occupation and use (St. Louis vs. Western Union Telegraph Company).

4. That in the determination of the amount of such reasonable compensatien to be paid for such occupation and use, the determination of the owner of the property is not conclusive nor binding upon the telegraph company, but that the courts may determine the amount of such compensation upon hearing and proof (St. Louis vs. Western Union Telegraph Company).

5. That by no form of agreement or stipulation can the owner of such post-road prohibit any telegraph company which has accepted the provisions of the Act of Congress of July 24, 1866, from occupying pursurnt to its provisions and under its restrictions such post-road with its telegraph lines and maintaining and operating the same thereon (United States vs. Union Pacific Ry. Co.).

These propositions are mere restatements of the principles which have been thus clearly decided by this Court, and their logic necessarily leads us in the determination of the fundamental question in this case to but one conclusion, viz., that the Act of July 24th, 1866, grants a right upon all the post-roads of the United States to a telegraph company accepting its provisions upon payment of reasonable compensation, to be fixed by proper proceedings in the Courts.

In taking up for consideration the nature of the procedure to be adopted to enforce the rights granted and conferred by the Act of July 24, 1866, let us look first at some cases which have arisen in the Federal Courts, and the manner in which they have dealt with this problem. These principles have been variously applied by the Federal courts, and we believe under the decisions no exclusive method of procedure to enforce and secure to the telegraph company the benefit of the provisions of the act has been adopted. The mode of procedure to fix the amount of compensation may be varied to meet the requirements of each case.

MODE OF PROCEDURE TO ENFORCE THE RIGHTS GIVEN BY THE ACT OF 1866, AND FEDERAL CASES RELATING THERETO.

Postal Telegraph-Cable Co. vs. Southern Railway Co.

(Sept. 9, 1898)

Thus in Postal Telegraph-Cable Co. vs. Southern Railway Company (89 Fed. Rep., 190), SIMONTON, J., secured to the telegraph company, the complainant in that case, its rights under the Act of Congress, by resorting to the procedure authorized by the statute of North Carolina for the purpose of ascertaining the amount of the compensation. Thus he says (p. 191):

"The respondent contends that there is no law in the State of North Carolina providing for the condemnation of land or the right of way for the use of telegraph companies. There is no doubt that any telegraph company incorporated by any State of the Union has the right to construct and maintain lines of telegraph along any railroad or other public highway in North Carolina, provided they be so constructed as not to obstruct or hinder ordinary travel thereon (Code N. C., 1883, Sec. 2007). Such right may be obtained from the railway company, owner of the land, franchise or easement therein by contract (Code N. C., Sec. 2008). The same Code (Sections 2009, 2010) provided that, failing to make such a contract, the telegraph company could, exercising the right of eminent domain, obtain the right of way desired, and the right to erect its poles, and establish offices, upon making just compensation therefor. *The same right to construct its lines along the right of way of post-roads of the United States is given under the act of Congress of 1866 to all telegraph companies accepting the provisions of that act (Rev. St. U. S., Secs. 5263, 5269); and the petitioner is one of the companies which has complied with all the requirements of this act, and has*

secured its privileges. But, notwithstanding this, before the privilege can be exercised upon the lands, the property of private persons or corporations, the consent of such persons must be obtained, or such proceedings must be had as will insure them just compensation. No act of Congress can give the right of taking private property for public purposes without first paying just compensation (Const. U. S., Amendment 5). And although section 8 of article 1 gives Congress power to establish post-roads, and to make all laws which may be necessary to carry this power into effect 'like all other powers granted to Congress by the Constitution, the power to regulate commerce is subject to limitations imposed by this instrument, among them that of the fifth amendment' (Monongahela Nav. Co. vs. U. S., 148 U. S., 325, 13 Sup. Ct., 622). *The mode or method of exercising this right of eminent domain is fixed by the laws of the several States.* Such mode or method is exclusive in its character in ascertaining the amount of just compensation to be allowed (see Roberts v. Railroad Co., 158 U. S., 1, 15 Sup. Ct., 756; Sweet v. Rechel, 159 U. S., 380, 16 Sup. Ct., 43). The Federal courts do not interfere with it, provided due process of law be furnished (Chicago, B. & Q. Co. v. City of Chicago, 166 U. S., 226, 17 Sup. Ct., 581). *This being the case we must look to the statute law of North Carolina alone for the mode of proceeding in the condemnation of lands or right of way—for the conduct of the procedure, and for the steps by which the just compensation is reached.* It is true that the purposes of the petitioner are greatly for the public benefit, that it is an important factor in interstate commerce, one of the agencies—and a most valuable agent—in interstate commerce, and that it is of most essential service to the citizen in time of peace and to the government in time of war. But the underlying proposition in our civilization and in Anglo-Saxon liberty is the protection of the citizen in the safety of his person and in the undisturbed enjoyment of his property. And when he is called upon to surrender that property against his will, for a public purpose, he is entitled to all the safeguards which the law has thrown around the exercise of the tremendous, though wholesome, right of eminent domain."

Then follows a discussion of the peculiar procedure provided by the statutes of North Carolina for ascer-

taining the amount of just compensation, but it is to be observed that the State legislation is resorted to for ascertaing the amount of compensation while the Act of Congress concerning with the legislation of the State is considered as conferring the ultimate right upon the telegraph company to enter upon the railroad. This case has a very direct application to the case at bar, because the equity bill in this case sets forth (Exhibit 26, Record, No. 199, p. 41; Record, No. 367, p. 38), proceedings at law instituted in the United States Circuit Court in the District of New Jersey, based upon the Act of Congress of July 24, 1866, and seeking to couple with such right under this Act the modes of procedure provided by the New Jersey statutes. Said law action (Exhibit 26 to the Bill) conforms to the modes of procedure prescribed by the statutes of New Jersey, as will be seen by the petition constituting said Exhibit 26 and the prayer thereof.

Chapter 53 of the Laws of New Jersey for the year 1900, is entitled "An Act to regulate the ascertainment and payment of compensation for property condemned or taken for public use." By Section 1 of the act it is provided:

"Whenever the proper officers of the State or of any county or of any municipal corporation, or of any other corporation, public or private, having power to take land or other property for public use, shall have determined to acquire land or other property, pursuant to authority conferred by law, and cannot acquire such land or other property by agreement with the owner, by reason of disagreement as to the price or legal incapacity or absence of the owner or his inability to convey a valid title, or to the lack of authority of the party determining to acquire the property to do so by agreement, or by reason of any other cause, the compensation shall be ascertained and paid in the manner directed by this Act."

Then follow in sixteen additional sections careful provisions (as was provided by the North Carolina statute and referred to by Judge SIMONTON) for the appointment of Commissioners, the hearing before the Commissioners and the determination of the compensation, together with full right of appeal from the decision of the Commissioners to a jury. Under the decision of Justice SIMONTON, above quoted, the Act of Congress gave the right, the State statute provided the procedure. The right being given by the Act of Congress, and the method of making that right effective by the New Jersey statute, we have all that is required to complete the acquisition of the needed property by the Telegraph Company.

Oregon Short Line Case.

(Judge BEATTY, June 19, 1900.)

The same question was solved in practically the same way in the case of the Postal Telegraph Cable Co. of Idaho vs. Oregon Short Line Railroad Co. 104 Fed. Rep., 623), by BEATTY, District Judge, sitting in Circuit. This was an action to condemn a right of way along the defendant railroad company's property, and upon this question Judge BEATTY says:

"Section 5263 of the Revised Statutes of the United States, enacted July 24, 1866, authorized any telegraph company to construct any telegraph line over the public lands and along military and post-roads, while Section 3964, enacted June 8, 1872, makes all railroads post-roads. The defendant procured practically all its right of way from the Government and built its road subject to the provisions of these statutes. It seems to me that they cut off discussion and determine the question involved in favor of the plaintiff. Moreover

numerous Courts have granted this right to telegraph companies against railroads, and in some cases where the railroads had purchased from citizens or had condemned the right of way, while here the defendant procured its right of way from the Government as a gift. It was, however, granted not so much as a favor to the defendant, but for the benefit of the public; and bearing this fact in mind, the right of way should still be used for the public good when it can be without detriment or even without material detriment to the defendant in the general use to which it is devoted. I hold that the plaintiff is entitled to the right of way asked, upon the payment of such damages as the defendant will suffer. * * * The statutes of the State and United States above referred to seem so clearly to give the plaintiff the relief it asks, and which is hereby given, that it is considered unnecessary to enter into any lengthy discussion or citation of the numerous authorities upon the question."

Oregon Short Line Case.

(Judge KNOWLES, March 22, 1902.)

The question was also before the Circuit Court of Montana, in Postal Telegraph-Cable Co. vs. The Oregon Short Line Company (114 Fed. Rep., 787), a proceeding for the condemnation of a right of way along the Oregon Short Line Railroad in the State of Montana, and Judge KNOWLES says :

" The plaintiff, on the argument before this Court, claimed the grant of a right of way over and along the defendant's railroad right of way, under and by virtue of the provisions of Sections 5263 to 5269 of the Revised Statutes of the United States. Evidence was introduced to show that the plaintiff had accepted the conditions named in the aforesaid statutes. Section 5263 of the statutes (*supra*), reads as follows :

" 'SEC. 5263. Any telegraph company now organized, or which may hereafter be organized under the laws of any State, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States over

and along any of the military post-roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post-roads.'"

It will be seen by this statute that the right is given to any telegraph corporation, organized under the laws of any State, to construct and maintain its telegraph line over and along any of the military or post-roads of the United States, which have been, or may hereafter be, declared such by law. Such lines must not interfere with the ordinary travel on such military or post-roads. By Section 3964 of the Revised Statutes of the United States, all railroads such as that operated by the defendant in this State have been and are declared to be post-roads. If this statute is applicable to this case, then the Act of Congress itself determines whether the power of eminent domain should be put in motion for the purposes named and whether the exigencies of the occasion and the public welfare required or justified its exercise. In the case of Boom Company vs. Patterson (98 U. S. 403), the Supreme Court, speaking by Mr. Justice FIELD, said: **"When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by an act of the legislature and the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested."** * * * Although Congress had put *its right of eminent domain in motion* by granting to telegraph companies who complied with the following provisions of the statutes the right of way *over and along the post-roads* and determined the necessity for *using said ways for telegraph purposes*, it, at the same time imposed the condition that such use should not interfere with ordinary travel thereon; but there was the further constitutional limitation that, before such right of way could be so utilized, just compensation should be awarded therefor to the owners or proprietors thereof.

There would not appear to be any doubt, from the evidence presented in this case, that the telegraph lines, as proposed by the plaintiff, may be constructed over and along the defendant's said right of way, so as not to interfere with the ordinary travel thereon. In this grant to the telegraph companies, Congress, however, made no provision for assessment of damages arising out of the taking. In the case of Kohl vs. United States (91 U. S. 367), the Supreme Court held that an action could be maintained as a civil action at law to fix the damages arising from the taking of any property for a public use. The Court there said:

"It is difficult, then, to see why a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is not within the meaning of the statute, a suit at common law when initiated in a Court. It is an attempt to enforce a legal right."

In that case, after adverting to the fact that Congress had made no provision for the assessing of damages for property taken under the power of eminent domain, the Court said:

"But there is no special provision for ascertaining the just compensation to be made for land taken. That is left to the ordinary processes of the law." * * * *

The views expressed in this opinion were affirmed in the above case of Boom Co. vs. Patterson.

"It would seem, then, that the plaintiff company had the right to proceed either in the State Court or in the Federal Court to ascertain the just compensation to which the defendant would be entitled for the amount of its railroad right of way taken for the plaintiff's telegraph line; and I might stop here, and proceed to determine the just compensation to which the defendant is entitled, were it not that it would seem in the suit brought here that the plaintiff appeals for its right, not to the power of eminent domain vested in the National Government, but to that power inherent in the State government. * * *

"In considering the act of Congress before quoted, it is evident that Congress was of the opinion that it would be right to appropriate *portions of any post-road for a telegraph line*, when such appropriation did not interfere with the ordinary travel thereon. Guided

by these opinions, I find in this case that the portions of the railroad right of way of the Oregon Short Line Railroad Company, in Montana, sought to be appropriated by the plaintiff to the uses named, is a proper appropriation, and a more necessary public use than that to which the defendant is devoting the same. This appropriation by the telegraph company of the right of way of the defendant must be confined, however, to that portion of the same not now actually used and required for railway purposes, and along a line which will not interfere with the ordinary use thereof for railway purposes."

It will be observed that the foregoing cases apply in one way the principles expressed in the decisions of this Court cited *ante*. They, however, resort to the procedure established by State statutes for the purpose of ascertaining the compensation, yet all of them construe the act of July 24, 1866, as giving the *right* to the telegraph company to enter upon and use the property of the railway company as a location for its telegraph lines, under and subject only to the conditions named in the act of July 24, 1866, and the duty to make compensation as provided in the 5th Amendment to the Constitution of the United States. They resort to the State statutes for the purpose of finding a procedure to ascertain and determine the amount of the compensation to which the railway company is entitled. In view of the provisions of the statutes of New Jersey, these cases are, therefore, in point, and justify the case which was brought by the Western Union Telegraph Company in the United States Circuit Court of New Jersey *at law* to ascertain the amount of that compensation.

But, while the procedure adopted in the foregoing cases was undoubtedly correct and justified by the decisions of this Court above cited, the insistence of

the telegraph company is that, even in case where no such State statute exists under the decisions of this Court, it was still clearly the right of the Western Union Telegraph Company to bring an action at law in the Federal Court for the proper district, or, in a proper case, by a bill in equity, to have the compensation determined.

Kohl Case

(Oct., 1875).

As to the right to institute a proceeding at law in a case such as this, the case of Kohl vs. United States (91 U. S., 367), is conclusive. Excluding for the moment the statute of New Jersey as to procedure, the case which has been brought by the Western Union Telegraph Company on the law side in the United States Circuit Court for the District of New Jersey is exactly in principle like the case of Kohl vs. United States. In that case a proceeding was instituted by the United States to appropriate a parcel of land in the City of Cincinnati. The statute authorizing the acquisition of a site for a post office simply authorized and directed the secretary of the treasury to purchase a central and suitable site in the City of Cincinnati for the erection of a building for the accommodation of the United States Courts, &c. In the appropriation act there was appropriated to commence the erection of a building the sum of $700,000, and "for the purchase, at private sale or by condemnation, of ground for a site therefor" the sum of $700,000; and by a subsequent appropriation act a further provision was inserted in the appropriation act for the purchase of a site for a

building for a custom house and post office, $750,000. No provision whatever was made for any proceeding to acquire title, no provision that the money should be paid for the site, nor any proceeding authorized to be instituted for the acquisition of the site unless implied from the authority to "purchase, at private sale or by condemnation." If appropriation was contemplated by Congress, it was implied as a result of the clear grant of the right to acquire, just as it is to be implied under the Act of Congress of July 24, 1866, from the clear, unqualified grant in the first section of that Act, of the right to construct, maintain and operate telegraph lines upon all post-roads.

With this, the sole legislation upon the subject, the United States District Attorney for the Southern District of Ohio prepared what is styled in the record of the case "an application" which he filed on the law side of the United States Circuit Court. The cause was entitled the United States of America, plaintiff, vs. In Lots No. 118, &c., in the City of Cincinnati, describing the boundaries of the same by streets. In this application the District Attorney set up the several acts of Congress, authorizing the Secretary of the Treasury to purchase a suitable site, and the further provision of the appropriation act by which a sum of money was set apart for the "purchase, at private sale, or by condemnation," of land for the purposes named in the original act. Then followed a definite description of the ground which had been selected by the Secretary of the Treasury, and the offer to purchase the same from the several parties who were thus alleged to be owners, and the failure to agree as to the value of the parcels with those owners, and the authorization there-

upon by the Secretary of the Treasury of the institution of this proceeding to obtain the title to the land for the public use of the Government of the United States. Then followed the detailed descriptions of the several subdivisions of the land, together with a statement of the persons who held or claimed to hold an estate, title or interest in each of such subdivisions. Following this statement and description—there being 24 lots in all—there was the prayer for the impanelling of a jury for inquiry and assessment of the compensation which the United States should pay for said property thus described and set forth, and asking that upon payment of the compensation equal to the sum so assessed and found by the jury, that the United States should be deemed to be vested with the title, to the land, and that the Court would distribute the sum paid to the parties designated as owners, as their interests might appear.

This is precisely the character of petition which was filed by the telegraph company in the United States Circuit Court for the District of New Jersey, and set up as exhibit 26 to the bill in equity in this cause. It follows the form adopted in the Kohl case in all essential particulars. The Circuit Court empannelled a jury and after a hearing took its verdict as to the value of the lots, and entered a judgment adjudging that the United States upon the payment of the amount found by the jury should be entitled to the lands for the purpose of a Post Office, United States Courts, etc. The defendants, the owners of the property, in that case, attacked this proceeding as one over which the United States Circuit Court for the Southern District of Ohio had no jurisdiction, alleging that no proceeding to condemn was

authorized by Congress, and that the application was filed entirely without authority of law and sued out a writ of error to this Court, from the judgment of the Circuit Court. Respecting this contention Mr. Justice STRONG, speaking for this Court, said:

"It is contended on behalf of the plaintiffs in error that the Circuit Court had no jurisdiction of the proceeding. There is nothing in the acts of 1872, it is true that directs the precise mode by which the contemplated condemnation should be effected, or which expressly authorized the proceeding in the Circuit Court to secure it. Doubtless Congress might have provided the mode of taking the land and determining the compensation to be made, which would have been exclusive of all other modes. They might have prescribed by what tribunal or by what adjudication the ascertainment of the compensation should have been accomplished. The mode might have been by a commission, or it might have been referred to the Circuit Court; but this, we think, is not necessary. The investment of the Secretary of the Treasury with power to obtain land by condemnation, without prescribing the mode of exercising the power, gave him also the power to obtain it by any means that were competent to adjudge a condemnation. The Judiciary Act of 1789 conferred upon the circuit courts of the United States, jurisdiction of all suits at law or in equity when the United States or any officer thereof, suing under the authority of any Act of Congress, are plaintiffs. If, then, a proceeding to take land for public use by condemnation may be a suit at common law, the jurisdiction of it is vested in the Circuit Court. That it is a 'suit' admits of no question. In Weston vs. Charleston (2 Pet., 464), Chief-Justice MARSHALL, delivering the opinion of the court, said: 'The term (suit) is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual obtains that remedy which the law confers. The modes of proceeding may be various, but if the right is litigated in a court of justice, the proceeding by which the decision of the court is sought is a suit. A writ of prohibition has therefore been held to be a suit; so has a writ of right, of which the Circuit Court has no jurisdiction (Green v. Liter, 8 Cranch, 229); so is a *habeas corpus* (Holmes v. Jamison, 14

Pet., 564). When in the 11th section of the Judiciary Act of 1789, jurisdiction of suits of a civil nature, at common law or in equity, was given to the Circuit Courts, it was intended to embrace, not merely suits which the common law recognizes as among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined as distinguished from rights in equity as well as suits in admiralty. The right of eminent domain always was a right at common law. It was not a right in equity nor was it even a creation of a statute. The time of its exercise may have been prescribed by statute, but the right itself was superior to any statute. That it was not enforced through the agency of a jury is immaterial; for many civil as well as criminal proceedings at common law were without a jury. It is difficult, then, to see why a proceeding to take land in virtue of the Governments eminent domain and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at common law, when initiated in a court. It is an attempt to enforce a legal right. It is quite immaterial that Congress has not enacted that the compensation shall be ascertained in a judicial proceeding. That ascertainment is in its nature at least *quasi-judicial*. Certainly no other mode than a judicial trial has been provided. * * *

"But there is no special provision for ascertaining the just compensation to be made for land taken. That is left to the ordinary processes of the law; and hence, as the government is a suitor for the property under a claim of legal right to take it, there appears to be no reason for holding that the proper Circuit Court has not jurisdiction of the suit under the general grant of jurisdiction made by the Act of 1789."

The judgment of the Circuit Court was affirmed.

Additional Cases.

Boom Co vs. Patterson.

(Oct. 1878.)

The question was again before the Court in the case of Boom Co. vs. Patterson (98 U. S., 403), whereby a condemnation suit pending in the State Court was removed to the Circuit Court of the United States. The Boom Company, the condemning company, raised a question as to the jurisdiction of the Circuit Court, which is thus disposed of by Mr. Justice FIELD:

"The proposition of the company on this head of jurisdiction is this: That the proceeding to take private property for public use is an exercise by the State of its sovereign right of eminent domain, and with its exercise the United States, a separate sovereignty, has no right to interfere by any of its departments. This position is undoubtedly a sound one, so far as the act of appropriating property is concerned. The right of eminent domain; that is, the right to take private property for public use, appertains to every independent government, and it requires no constitutional recognition. It is an attribute of sovereignty. The clauses found in the constitution of the several States providing for just compensation for property taken is a mere limitation upon the exercise of the right. When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by the act of the legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested, but the subject matter of the right is one that appertains to the sovereignty. When the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance. If that inquiry take the form of proceedings before the court between the parties—the owners of the land on the one side and the company seeking the appropriation on the other—there is a

controversy which is subject to the ordinary incidents of a civil suit and its determination derogates in no respect from the sovereignty of the State."

United States vs. Jones.

(Dec. 10, 1883.)

The case of the United States vs. Jones (109 U. S., 513) was a proceeding by the United States to acquire the property of a corporation known as the Green Bay and Mississippi Canal Company. Under an Act of Congress, the Secretary of War was authorized to join with the company in the appointment of a board of arbitrators to determine the value of the works sought to be acquired by the United States. After the acquisition of the works by the United States, the State of Wisconsin passed a law providing for the ascertainment of compensation to be made for damages caused by overflow from some of the dams which were maintained by the improvement. Commissioners were appointed, before whom the parties appeared, the United States being represented by counsel retained by the Department of Justice. The Commissioners awarded the petitioner the sum of $8,000, and from that award an appeal was taken to the Circuit Court, where the case was brought before a jury. Before the impaneling of the jury the defendants objected to the action of the Court upon the ground (1) that it had no jurisdiction of the defendants; (2) it had no jurisdiction to try a case to which the United States was a party; (3) that the act of Congress was unconstitutional in assuming to confer upon said Court the authority to try a case to which the United States was a party.

The trial resulted in a verdict for the plaintiffs and

this judgment was taken upon writ of error to the Supreme Court of the United States. Upon the question we are considering Mr. Justice FIELD, delivering the opinion of the Court, says :

" The position of the counsel of the United States in the court below, as we understand it, was substantially this ; That the power vested in the Federal Government to take private property for the public use of the United States is, in its nature, exclusive, and its exercise by any State is, therefore, prohibited as completely as though the prohibition were expressed in terms ; that the power cannot, therefore, be delegated to the State of Wisconsin ; *that the ascertainment of the compensation is involved in the exercise of the power as a necessary part of it,* inasmuch as there can be no lawful taking until compensation is made ; and that the act of Congress transferring to the State board and State court the function of ascertaining the value of the property taken and the amount of compensation to be made is therefore invalid.

" *There is in this position an assumption that the ascertainment of the amount of compensation to be made as an essential element of the power of appropriation ; but such is not the case. The power to take private property for public use, generally termed the right of eminent domain, belongs to every independent government.* It is an incident of sovereignty, and, as said in Boom Company v. Patterson 98 U. S., 106, requires no constitutional recognition. The provision found in the Fifth Amendment to the Federal Constitution and in the constitutions of the several States for just compensation for property taken is merely a limitation upon the use of the power. It is no part of the power itself, but a condition upon which the power may be exercised. * * * *But there is no reason why the compensation to be made may not be ascertained by any appropriate tribunal capable of estimating the value of the property. There is nothing in the nature of the matter to be determined which calls for the establishment of any special tribunal by the appropriating power.*

" The proceeding for the establishment of the value of the property and subsequent compensation to be made is merely an inquisition to establish a particular fact as a preliminary to the actual taking ; and it may

be prosecuted before commissioners or special boards or the courts, with or without the intervention of a jury, as the legislative power may designate. All that is required is that it shall be conducted in some fair and just manner, with the opportunity to the owners of the property to present evidence as to its value and to be heard thereon. *Whether the tribunal shall be created directly by an act of Congress or one already established by the States shall be adopted for the occasion, is a mere matter of legislative discretion.* Undoubtedly it was the purpose of the Constitution to establish a general government independent and in some respects superior to that of the State governments—one which could enforce its own laws, through its own officers and tribunals; and this purpose was accomplished; that government can create all the officers and tribunals required for the execution of its power. Upon this point there can be no question."

Kohl vs. United States, 91 U. S.

High Bridge Lumber Co. vs. United States.

(July 2, 1895.)

In the case of High Bridge Lumber Company vs. United States (69 Fed. Rep., 320) the question of the proper method of procedure came before the Circuit Court of Appeals for the Sixth Circuit in a proceeding by the United States against the High Bridge Lumber Company for the condemnation of certain lands for a lock and dam on a navigable river. The proceedings were had in the United States District Court with reference to lands, in the State of Kentucky, which had no statute relating to the condemnation of lands for such purposes, and it was held that the compensation to be awarded must be determined by the principles of the common law, and that no allowance for consequential damages could be made. The suit in the case was instituted by a petition filed in the District Court of the United States for the District of Kentucky, under an

act of Congress which authorized proceedings to be instituted in the name of the United States in the United States Circuit Court or District Court of the district where the real estate was located, such proceedings to be prosecuted according to the laws relating to suits for the condemnation of property for States where the condemnation proceedings may be instituted. Upon this subject LURTON, J., announcing the opinion of the Court, says:

"In this case there is no statute prescribing the damages to be assessed. The Kentucky statute concerns only the damages which are to be allowed as a condition upon which railroad corporations are allowed to condemn lands or materials necessary in railroad construction. The provision in the Act of Congress heretofore cited, requiring condemnation proceedings to be prosecuted 'in accordance with the laws relating to suits for the condemnation of property of the States where the proceedings may be instituted', has no application to a condemnation for river improvement purposes instituted by the United States, other than to require that the practice and proceeding shall 'as near as may be' be in accordance with like causes in the courts of record of the State within which such Circuit Court or District Court is held. It is not to be conceived that Congress intended that a legislative requirement giving to an owner consequential damages when his land was sought to be appropriated by a railroad company, should have application when the United States undertakes to condemn lands necessary for the improvement of navigation. The right of eminent domain is a common-law right, inherent in every sovereignty unless denied by its fundamental law. It is a right which exists in the Federal Government, and may be exercised by it within the States, so far as necessary for the enjoyment of the powers conferred upon it by the Constitution (Cooley, Const. Lim., 526; Kohl v. United States, 91 U. S., 367; U. S. v. Jones, 109 U. S., 513). The only constitutional limitation upon this right of eminent domain is found in the provision which forbids the taking of private property for public purposes without just compensation. That Congress may delegate to such tribunals

power to fix and determine the amount of compensation to be paid by the United States for private property taken by them for public purposes, or adopt the rules of law prescribed by the State for that purpose, is not to be doubted."

Common Law Procedure not Exclusive.

While the foregoing authorities clearly establish the doctrine that compensation may be ascertained in common-law proceedings in the United States courts or by the adoption in such court of the machinery provided by the State statute, yet these courts are not confined to such proceedings, and in proper cases, the compensation may be ascertained in proceedings in equity, and the court may decree that upon the payment of such compensation, the party shall have the right to maintain the improvement in question. The principles upon which the courts will proceed in thus adjudicating have been very clearly outlined by some of the Federal courts, adopting in that respect, however, the same principles that have been applied in the State courts.

McElroy vs. Kansas City.
(August, 1884).

Justice BREWER, when Circuit Judge, had occasion to consider the duty of a chancellor, in a case of that sort, and very elaborately outlined the principles, which should control his action, in the case of McElroy vs. Kansas City (21 Fed. Rep., 257). In that case the complainant was the owner of a lot on the corner of two streets in Kansas City. The grade of the street had been established by the city

by an ordinance, the carrying into execution of which would leave the lot of the complainant many feet above Sixth street, and seriously damage the value of the complainant's property. Under the Constitution of Missouri it was provided that private property should not be taken, *or damaged* for public use without just compensation. The Legislature had made no provision for procedure by which the city could ascertain the amount of the damage in a case of this character, and it was insisted on the part of the complainant that this provision of the Constitution was not self-executing; that the city, having no statutory authority to condemn, or to proceed in the Courts to ascertain the extent to which its operations would damage the lot in question, was powerless to go forward with the improvement, and that the only thing for the Court to do was to grant a perpetual injunction against the city's action, and thus tie up, and prevent a public improvement until the Legislature should act.

It will be observed that there was not here, as in the case at bar, great public interests involved, in the way of intercommunication, and possible suspension of the functions of an agency of the Federal Government, but simply the question of action by one of the municipal subdivisions of the State affecting at most a very small section of the public. BREWER, Circuit Judge, lays down the following general propositions as controlling in the decision which he reached (p. 261) :

"FIRST. A Chancellor, in determining an application
" for an injunction, must regard not only the rights of
" the complainants which are sought to be protected,
" but the injuries which may result to the defendant or
" to others from the granting of the injunction. If the

" complainant's rights are of a trifling character; if the
" injury which he would sustain from the act sought
" to be enjoined can be fully and easily compensated,
" while, on the other hand, the defendant would suffer
" great damage, and especially if the public would
" suffer a large inconvenience if the contemplated act
" was restrained, the lesser right must yield to the
" larger benefit; the injunction should be refused, and
" the complainant remitted to his action for damages.
" This rule has been enforced in a multitude of cases,
" and under a variety of circumstances, and is one of
" such evident justice as needs no citation of authori-
" ties for its support.

" SECOND. When the defendant has an ultimate right
" to do the act, sought to be restrained, but only upon
" some condition precedent, and compliance with the
" condition is within the power of the defendant, in-
" junction will almost universally be granted until the
" condition is complied with. This principle lies at
" the foundation of the multitude of cases which have
" restrained the taking of property until after the pay-
" ment of the compensation, for in all those cases the
" Legislature has placed at the command of the de-
" fendant means for ascertaining the value of the
" property. In those cases the courts have seldom
" stopped to inquire whether the value of the property
" sought to be taken was little or great, whether the
" injury to the complainant was large or small, but
" have contented themselves with holding that, as the
" defendant had full means of ascertaining such com-
" pensation, it was his first duty to use such means,
" determine and pay the compensation, and until he
" did so the taking of the property would be enjoined.

" THIRD. Where the defendant has an ultimate right
" to do the act sought to be enjoined upon certain con-
" ditions, and the means of complying with such
" conditions are not at his command, the courts will
" endeavor to adjust their orders so on the one hand
" as to give to the complainant the substantial benefit
" of such conditions, while not restraining the defend-
" ant from the exercise of its ultimate rights. Thus,
" in the case at bar, the defendant has of course the
" ultimate right to grade this street. As a condition
" of such right is a payment of damages, but it has no
" means of ascertaining those damages; no tribunal
" has been created, no provision of law made, for their
" ascertainment. Hence, if possible, the Court should

" provide for securing to the defendant this ultimate " right, and at the same time give to the complainant " the substantial benefit of the prior conditions.

" FOURTH. In applying the rule first stated to a case " like the one at bar, the Court should have principal " regard to three matters:

" (1) The amount of injury to the complainant. It " is obvious that a grade of a single foot in front of a " city lot would work but trifling injury, while on the " other hand the grade might be such as practically to " destroy the value of the adjacent property. In the " one case it would seem a great hardship to tie up a " public improvement because of some trifling injury " to the complainant, the amount of which injury was " not attainable by any established means, and there- " fore that the party might justly be left to his action " for damages; while in the other case the Court might " well insist that the value of complainant's property " should not be wholly wrecked until such value has " been paid to him.

" (2) The Court will consider the solvency of the " defendant. If some irresponsible corporation should " seek, in the exercise of the power of eminent do- " main, and under the guise of the contemplated pub- " lic improvement, to do serious damage to property, " the Court should promptly say that the owner was " not bound to take the chance of collecting his dam- " age from such a corporation, and imperatively re- " quire the prior adjustment and payment of such dam- " ages; while if the party attempting the improve- " ment was a corporation of established and permanent " solvency, the Court might say that the complainant " would run little risk in pursuing simply his action for " damages.

" (3) If the improvement was one of great public " importance the Court would justly regard that as a " reason for not lightly interfering with the work, while " if the improvement was more of a personal specula- " tion and for private gain, the prior protection of the " complainant would be most rigorously insisted on. " Thus, if in the centre of a large and thriving city like " the defendant, some improvement was contemplated " which the necessities of business proclaimed to be " urgent, the Court on no slight consideration should " interfere to delay or restrain it; while on the other " hand, if it was some matter in the outskirts of the " city, having obviously principal reference to the pri-

" vate speculation of the individual, and of no earnest
" or urgent demand of public good, the attention of
" the Court would be properly directed to the full pro-
" tection of the complainant's prior right. I think
" such considerations as these, and others of a similar
" nature, when properly regarded by the Courts, will
" afford ample protection to individual rights without
" unnecessary interference with needed public improve-
" ments; and that, until the legislature makes suitable
" provision for the ascertaining of damages to property
" not taken, the Courts should be guided by them in
" determining all applications of this nature for an
" injunction.

" Now, looking at the facts of this particular case, it
" is evident that the injury to complainant's lot will be
" serious; that the solvency of the defendant is un-
" questionable, and that any judgment for damages
" against it can be easily collected; and also that the
" improvement is not one of pressing public necessity,
" but in the outskirts of the city, and having reference
" mainly to private benefit and individual speculation.
" I think, therefore, that the complainant is entitled to
" a restraining order, but at the same time it should
" not be absolute and unconditional.

" The section of the Constitution provides that this
" compensation shall be ascertained by a jury or Board
" of Commissioners of not less than three freeholders.
" It is within the power of a Court of Chancery to pro-
" vide a Board of Commissioners. The order, there-
" fore, will be that upon the giving a bond in the sum
" of $3,000, and the filing of a stipulation to accept
" such damages as shall be ascertained in the manner
" herein provided in full satisfaction of all claims
" against the defendant, the defendant will be restrained
" from grading said street.

" Provided, that at any time the defendant may,
" upon 20 days' notice, apply to either of the Judges
" of this Court for the appointment of a Board of
" Commissioners of three freeholders to ascertain and
" report the amount of damages which complainant
" will sustain by reason of the grading of said street,
" and upon the payment of the damages so reported
" by such commissioners the injunction will be va-
" cated."

Osborne vs. Missouri Pacific Ry. Co.
(January 16, 1893.)

The principle of this decision is expressly approved by the Supreme Court of the United States in Osborne vs. Missouri Pacific Railway Company (147 U. S., 248). This case was an action by an abutting owner upon a street in the City of St. Louis, and its purpose was to enjoin the construction of a track along Gratiot Street, whereby it was claimed that great, unascertainable and irreparable damage would be caused the complainant's business. Upon this question we are considering. Chief-Justice FULLER, delivering the opinion of the Court, says (p. 259):

"In McElroy vs. Kansas City (21 Fed. Rep., 267), which was an application for an injunction to restrain the grading of a street in front of the complainant's lot, Mr. Justice BREWER, then Circuit Judge, considered under what circumstances the Chancellor could grant such relief. It was the rule that, if the injury which the complainant would sustain from an act sought to be enjoined could be fully and easily compensated at law, while on the other hand the defendant would suffer great damage, and especially if the public would suffer large inconvenience if the contemplated act were restrained, the injunction should be refused, and the complainant remitted to his action for damages. *If the defendant had an ultimate right to do the thing sought to be restrained, but only upon some condition precedent, and compliance with the condition was within the power of the defendant, the injunction would almost universally be granted until the condition was complied with; but, if the means of complying with the condition were not at the defendant's command, then the court would adjust its order so as to give the complainant substantial benefit of the condition while not restraining the defendant from the exercise of his ultimate rights.* Inasmuch as, while the statutes of Missouri provided for the assessment of damages resulting from the taking of the property for public

use, there existed no provision to attain that result where the property was merely damaged, an injunction was granted with leave to the defendant to apply for the appointment of a board of commissioners to ascertain and report the damages which the complainant would sustain, upon the payment of which the injunction would be vacated.

"Assuming, as the Circuit Judge did, and as we prefer to do in disposing of the case upon this record, that if the complainant had sustained damage it had a cause of action, we, nevertheless, entirely agree that the bill was properly dismissed.

"Evidence was adduced of the extent and character of the alleged damage, although the Circuit Court did not undertake to go into the question of the amount, and the result was that the court concluded that the use of the track had not seriously obstructed, and would not in the future seriously obstruct, access to complainant's premises, and that the lessening of the market or rental value of the property was in any event small; that a jury might find that no damage had been sustained, or that it was inconsiderable, and that there was no proceeding which the defendant could take to obtain an estimate of damages, if any, while the complainant had an adequate and simple remedy by action of law.

"The prayer was for an unconditional injunction, and, although this was coupled with a prayer for general relief, a decree different from that specifically prayed for could hardly have been awarded under the general prayer, as the averments of the bill were not introduced for that purpose; and, besides, the complainant explicitly disclaimed upon the hearing any desire for the ascertainment of damages in this proceeding.

"The statutes of Missouri provided for the assessment of compensation for the taking of property for public use, but not for such assessment where the property was merely damaged and complainant occupied the position of seeking by an absolute injunction to compel the defendant to pay such an amount as accorded with his own judgment upon that matter. It may be true that, if this had been a case where compensation as such was demandable, the defendant, by filing a cross-bill, could have obtained an order such as was entered in McElroy vs. Kansas City, but it is useless to indulge in speculation in this regard."

Additional Cases.

The same doctrine is applied in a very recent case, New York City vs. Pine (185 U. S., 93), citing in the opinion, among others, some of the elevated railway cases decided by the Court of Appeals of New York, in which the same doctrine as to the power of a court of equity to determine the compensation upon the same principle as in a condemnation case is applied. (see, also, Galway vs. Elevated Railway Co., 128 N. Y., 132; Shepard vs. Elevated R. R. Co., 117 N. Y., 442).

St. Paul, Minneapolis and Manitoba Ry. Co. vs. Western Union Telegraph Co.

(November 3, 1902.)

An instructor case upon the application of the Act of Congress of July 24, 1866, is a recent decision of the United States Circuit Court of Appeals for the 8th Circuit, in St. Paul, Minneapolis & Manitoba Ry. Co., appellant, vs. Western Union Telegraph Co. and the Northwestern Telegraph Co., appellees, 118 Fed. Rep., 497. This case affirms not only the power of a court of equity, as announced in the opinion of Justice BREWER and in the subsequent cases, cited *ante*, to effect what may be called an equitable condemnation, but in that it sustains the power of a court of equity to do so in favor of a telegraph company which has accepted the provisions of the Act of Congress of July 24, 1866, and by virtue of the grants to such company in the first section of that Act. The question arose in this case in this form. A contract for ten years had been entered into between the railroad

company, and the telegraph company for the construction and operation of telegraph lines along the railway. The contract was absolutely silent as to the ownership of the telegraph lines after the termination of the period named in the contract. The railway company claimed that under the doctrine of annexation the telegraph lines became its property on the termination of the ten-year period named in the contract, and filed its bill in the United States Circuit Court for the District of Minnesota to have the telegraph lines which had been constructed during the time named in the contract decreed to be its property. The telegraph company filed a cross-bill, setting up among other things, the Act of Congress of July 24th, 1866, its acceptance of the provisions of that Act, and its obligations to the United States Government thereunder, its construction of the lines and its ownership of them, and that by virtue of the provisions of the Act of Congress of July 24th, 1866, it was entitled to continue to maintain and operate its telegraph lines over and along the right of way of the railway company, subject only to the provision of making a reasonable and just compensation for the property occupied by its telegraph lines, and that such occupancy would not interfere with the ordinary travel upon such railways.

There was thus presented upon this cross-bill the question of the ultimate right of the telegraph company to appropriate a right to continue its telegraph lines along the railroads of the appellant, by virtue of the provisions of the Act of Congress of July 24, 1866. The Circuit Court disposed of the case in favor of the telegraph company upon other questions without reaching the question raised by

the cross-bill of the defendant telegraph company; but in the Circuit Court of Appeals Justice THAYER, announcing the opinion of the Court, considered this question, and granted relief which could only have been granted upon the principle that by the Act of July 24, 1866, there was given to the telegraph company the right to appropriate the continued right to maintain and operate its telegraph lines over and along the railways of the complainant. He says:

"We are of opinion that it is competent for a court of equity, in the situation which confronts us in this case, to fix the compensation to be paid to the Railway Company for the use of its right of way for the future support and maintenance of the telegraphic lines which were erected thereon subsequent to July 1, 1882, under the provisions of contract 'B'; and that this power should be exercised if it so happens that no agreement can be reached by the parties themselves with respect thereto, and the Railway Company shall insist in future upon their being removed from its premises. Telegraph companies are recognized everywhere as common carriers of information and such important factors in the transaction of interstate commerce as to bring them within the protection of the Federal Government and subject them to its regulation and control (*Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S., 1, 9). So important are the public functions which they perform, that an act of Congress, passed on July 24, 1866 (Revised Statutes, § 5263), gave to telegraph companies, who accepted the provisions of the act, in broad terms, the right to construct and maintain their lines 'over any portion of the public domain of the United States * * * and along any of the military or post-roads of the United States which (had) been or (might thereafter) be declared such by law,' provided they were so constructed as not to interfere with travel on such military or post-roads. A subsequent act of Congress (Revised Statutes, § 3964) declared all railroads then or thereafter in operation to be *post-roads*; and while the construction placed on the former act has been that it does not give to a foreign telegraph company, in any State, the right to enter upon private property and set its poles without the owner's consent

(*Pensacola Telegraph Co. v. Western Union Telegraph Co., supra ; Western Union Telegraph Co. v. Ann Arbor Railroad Co.*, 178 U. S., 239, 243), yet, if a telegraph company erects its poles on a railroad right of way with the consent of the owner, as in the present instance, and its poles and wires in no wise interfere with travel or the operation of the railroad, no reason is perceived why a court of equity should compel it to remove its lines from the right of way if the telegraph company is willing to pay a reasonable compensation for its use, especially where it appears that no express agreement was made that they should be removed, when the lines were erected.

"Furthermore, the statutes of the State of North Dakota (Revised Code of North Dakota, 1899, § 5956) expressly confer upon telegraph companies the right to exercise the power of eminent domain for the location of their lines, and we presume that similar statutes have been adopted in some if not all of the States where other portions of the lines in controversy are located. This power, of course, cannot be exercised *for the condemnation of rights of way over property already devoted to a public use if the new use would materially interfere with the old ; but it is not apparent that the existence of a telegraph line on a railroad right of way, where such lines are usually erected, would materially interfere with the operation of any railroad, and in the present instance it is conceded that there would be no such interference.*

"It has been held, and the proposition seems to be well established by authority, that where a corporation which has the right to acquire property by an exercise of the power of eminent domain, has taken possession of property and has erected or is engaged in the erection of structures thereon but has not complied with some condition precedent necessary to render its acts in all respects lawful (such, for instance, as a failure on its part to pay some person the damages necessarily incident to the maintenance of the structure) and such person appeals to a court of equity for an injunction to restrain the maintenance or to compel the removal of the structure, the court to which such appeal is made has the power to determine the amount of the unpaid damages and to withhold an injunction and direct that the structure be permitted to remain and be operated provided the assessed damages are paid. Courts of equity will, as it seems, the more

readily pursue such a course when important public interests are at stake and a contrary course would be productive of much public inconvenience and annoyance, *City of New York and Bird S. Coler, Comptroller, v. Pine et al.*, 185 U. S., 93; *Pappenheim v. Metropolitan Elevated Railroad Co.*, 128 N. Y., 436, 444; *Shepard v. Manhattan Railway Co. et al.*, 117 N. Y., 442, 448 and cases there cited; see, also, *Osborn v. Mo. Pac. Ry. Co.*, 147 U. S., 248, 259; *Joy v. St. Louis*, 138 U. S., 1; *McElroy v. Kansas City*, 21 Fed. Rep., 257.

We think, therefore, that the decree should contain a provision authorizing the Western Union Company, if it fails to come to an agreement with the Railway Company, and the latter company shall insist upon a removal of the lines, to apply to the court at the expiration of the aforesaid stay of proceedings, for the appointment of a master and two commissioners to assess such reasonable compensation as they think ought to be paid by the Western Union Company for the privilege of maintaining the lines of telegraph erected since July 1, 1882, where they now are and the compensation to be paid for the distribution of material when the lines are built."

The foregoing cases show that the Pensacola case and the Ann Arbor case, indicate the absence of a power to appropriate *private property* generally under the provisions of the Act of July 24, 1866, yet in a number of other cases this Court and other Courts have so construed the act as necessarily to involve all the elements of a grant of power to appropriate the classes of property named in the Act, to wit, Public Domain, Land under Navigable Waters, and along and upon Post Roads. These conclusions will be found to necessarily follow from a consideration of the general policy of the Act, and the language employed, construed in the light of the contemporary circumstances, and history.

General Considerations Concerning Act of July 24, 1866.

But let us look now at the Act of July 24, 1866, and see if we can ascertain from any of the legitimate aids to the construction of that act, whether Congress really did intend the act to be interpreted as the railroad companies seek to interpret it, or whether it was intended that it should have the effect and meaning that is contended for by the telegraph company.

The first suggestion with respect to the act and its meaning as construed by the railroad companies is that with such construction it practically becomes meaningless, that such construction emasculates the Act and deprives it of all force and effect. The natural inference from the language of the act, that any telegraph company now organized or which may hereafter be organized under the laws of any state, shall have the *right* to construct, maintain, and operate lines of telegraph over and along any of the military or post-roads of the United States, &c., is that Congress intended to confer some privilege or power which such telegraph company would not possess in the absence of the act. Yet the construction contended for by the railroad companies gives it no such power whatever, because if the telegraph company is not given the means to enforce the "*right*" to construct, maintain, and operate telegraph lines over and along the post-roads of the United States, the Act amounts to but a mere permission by Congress to the telegraph company thus to construct, maintain and operate, provided the consent of the State, and the consent of the owner of the post-road (the railway com-

pany) is obtained. That is not a "*right*" to construct; it is a mere permission to construct, conditioned upon the consent of other parties, a permission which it required no act of Congress to make effective.

Again, if the construction contended for by the railroad companies is adopted that, as to post-roads, the telegraph company may construct, maintain and operate, if it makes an arrangement with the railroad company owning the post-road, and under the act there is no means of compelling the railroad company to enter into any arrangement—no legal method of requiring an arrangement, in lieu of the railroad company's consent thereto—then the "*right*" to construct, maintain and operate, is not granted by the Act, but is dependent upon the personal will or whim of the railroad company. The same may be said respecting the consent of the State as the owner of the post-road, where it is a highway, or a turnpike. Evidently that was not what was in the contemplation of Congress in passing this act, and evidently this Court did not consider that to be the meaning of the act, because in the Pensacola case, the St. Louis cases, and in the Union Pacific case, cited *ante*, the clearest affirmation is made of the proposition that neither the State, the city, nor the railway company, as the owner of the post-road, can arbitrarily refuse permission to the telegraph company to go along and upon the post-road. In the St. Louis case, the Court held that the city, as the owner of the streets, cannot arbitrarily determine the amount of the compensation for their use by the telegraph company, but the court is an arbiter to which the telegraph company may appeal to determine whether the claim of the city as owner of the post-road for compensation is reasonable and just. This is precisely

what is done in the case of condemnation, which is often described by the courts as a forced sale, the Court coming in to fix and determine the just terms upon which the title shall be transferred from the owner to the public agent making the purchase.

We have then the remarkable anomaly presented under the construction of this Act of July 24, 1866, contended for by the defendant railroad companies in this case; that the railroad company cannot, by express contract, bind itself to keep the telegraph company off of its right of way—such a contract being absolutely void, as decided by Mr. Justice HARLAN (160 U. S.), because against the declared policy of that act, which was declared to be:

> "The object of that act was not only to promote and secure the interests of the Government, but to obtain for the benefit of the people of the entire county every advantage in the matter of communication by telegraph which might come from competition between corporations of different states,"

but that it may arbitrarily defeat this act and its declared policy by arbitrarily refusing to take any action. The Court will not construe this act in such a way as to involve such contradictions and absurdities.

It is further to be observed that to apply the decision in the St. Louis cases to streets and highways, and deny its applications to railways, is to introduce a classification of Post Roads not justified by any language in the Act of July 24, 1866, or in the nature of the case. All Post Roads are equally subject to the control of Congress. Congress had by repeated enactments, prior to the passage of the Act of July 24, 1866, made all railroads Post Roads. The

language of the Act of July 24, 1866, so far from indicating any intention to differentiate the Post Roads or to classify them, indicates an intent uniformly to subject all Post Roads in the United States to the operation of the act. No reason is apparent in the subject matter of the legislation why it should be made to apply to streets and highways to the extent decided in the St. Louis case, and its application to railways be denied. The language is very comprehensive. It is "over and along *any* of the military or post roads of the United States, which have been, or may hereafter be declared such by Act of Congress." No more definite words could have been employed to express the intent of Congress that the act should apply to *all* post roads everywhere of whatever kind, and by whomsoever owned and controlled. Under the Act of Congress, cited *ante* (p.), the language of the first section of the act is as definite as though it had used the terms "all railroads."

In the brief of the Railroad Companies in the Court below it is said, respecting the St. Louis case:

"In that case, however, the Supreme Court was dealing, not with property devoted to a public use owned by a private corporation, but with public property devoted to a public use—in other words, with a public highway owned and controlled by the public. All that was said by Mr. Justice BREWER is to be read in connection with that fact. Whilst Congress never intended, as was held in the two cases from which we have quoted so fully, to take railroad property out of the possession of its owners, it did intend to permit the use of a public highway owned by the public for the location thereon of a line of telegraph wires. * * * It may very well be that the Federal Government may insist upon the occupation of public streets; but this proposition is entirely different from the one which was negatived by the Supreme Court in the Pensacola and Ann Arbor Cases" (Brief, p. 40).

No such distinction between classes of highways, we insist, is justified by any language in the Act of July 24, 1866. The only basis for the statement that Congress intended to permit the use of public highways owned by the public for location thereon of telegraph wires and poles is the language in the first section of the Act granting the right to any telegraph company to locate, construct and maintain its lines of telegraph over and along the military and post-roads of the United States.

If, from this language the fair intent of Congress is evidenced to permit the use of public highways, owned by the public, which are post-roads for the location of lines of telegraph wires and poles, it is impossible in the absence of any expression of intention to discriminate in the Act itself, to find a foundation for the discrimination which is insisted upon by the defendant railroad companies in favor of railroads which are "highways," and which, by repeated acts of Congress long prior to the enactment of this Act, had been declared to be post-roads. Observe, also, that all highways alike are classified under the term "post-roads," and the concession in the brief above quoted is practically a concession of the meaning of the Act contended for by the telegraph company.

On the other hand, the construction of this act contended for by the telegraph company makes it consistent with itself and with the language employed in the body of the act; with the avowed purpose of Congress in passing the act as expressed in the title; with all the discussions which accompanied its passage;

also with the course of legislation prior to its passage all of which may also be looked to as explanatory of the real meaning of the act.

The title of the act expresses a clear purpose—viz.,

"An Act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes."

In the brief of the Pennsylvania Railroad Company in the Court below (p. 28), it is claimed that such aid could be afforded to the Telegraph Company

"(1) by giving the consent of the government to construct lines through its public domain, and over and along its military and post roads, and across the navigable streams and waters of the United States,"

apparently without considering the curious anomaly that, in 1866, and still more markedly since that time, the parts of the country where anything would be granted to the telegraph company under that construction of the act, would be the parts where, for postal, as well as for military purposes, telegraph lines would be very rarely constructed, and but little needed; that is to say, in the great bulk of the territory of the United States where the need for intercommunication, free and unobstructed, for the public and the government, was the greatest, the act would practically have no effect, and where it did have any application, there would be very little need for the lines for postal purposes, some for military, possibly, but not sufficient to justify the broad title given to the act.

This contention, however, that the act is limited to the military and post roads of the United States upon the public domain was one of the litigated questions in Pensacola Telegraph Co. vs. Western Union Tele-

graph Co., and was fully disposed of by Chief-Justice WAITE. He says:

"It is insisted, however, that the statute extends only to such military and post roads as are upon the public domain; but this, we think, is not so. The language is 'Through and over any portion of the public domain of the United States, over and along any of the military and post roads of the United States which have been or may hereafter be declared such by Act of Congress, and over, under or across the navigable streams or waters of the United States.' There is nothing to indicate an intention of limiting the effect of the words employed, and they are, therefore, to be given their natural and ordinary signification. Read in this way, the grant evidently extends to the public domain, the military and post roads, and the navigable waters of the United States. These are all within the dominion of the national government to the extent of the national powers, and are, therefore, subject to legitimate congressional regulation."

Observe that long prior to the passage of this Act of Congress, 1866, repeated acts of Congress had made all railways post roads, and the mails for many years had been continuously carried over them.

It is further to be noted that, under the construction contended for by the railroad companies, as applied to the telegraph lines in existence at the time the act was passed, a very small portion of them could be expected to be constructed upon the public domain of the United States, or upon military and post-roads belonging to the United States. Yet, it was evidently the expectation of Congress that telegraph companies controlling the telegraph lines then in existence would accept the privileges of the act, for in the third section of the act there was the stipulation for the benefit of the Government that it should have at any time within five years from the date of the passage of the act, the right to purchase from the telegraph com-

panies, accepting its provisions, all their lines, property and effects, at an appraised value. Evidently, it was not intended that there should be a distinction as to the right of the United States, upon the purchase, to maintain and operate these lines; that the right should be absolute as to those upon its own property, and that its right thereafter to maintain and operate telegraph lines along the post-roads of the United States not upon the public domain, where the bulk of these telegraph lines were then located and constructed, should be dependent under this act, upon any sort of arrangement which the railway companies of the country should see fit to compel the Government to make with them. This would impute to Congress the absurd intention of bargaining for the right to acquire properties the right to continue to maintain and operate which depended upon the consent of the railway companies of the United States. Evidently, the belief of Congress in passing this act was that the act effected a complete arrangement on its part, first, to aid in the construction, maintenance and operation of all of the telegraph lines of any company accepting the provisions of the act everywhere within the limits of the United States, upon Post Roads, over Public Domain and under Navigable waters, and, second, to secure to the Government, the use of the same for postal, military and other purposes, if it saw fit to act upon the option secured to it by the Act.

Legislative History of Act of July 24, 1866.

This construction of the act is enforced not only by the title and language employed, but also by a brief

reference to the debates leading up to the enactment of this Act of July 24, 1866, and its legislative history. *The bill* originated in the Senate at the first session of the 39th Congress. At that session the question of the expediency of establishing a Government postal telegraph was brought before Congress, by a resolution of the Senate, offered by Mr. Gratz Brown, of Missouri, directing the Committee on Post-Offices and Post-Roads to inquire into the expediency of authorizing the Post-Office Department to construct and operate telegraph lines along the principal mail routes, and, in connection with the postal business, to establish offices at such points as might be determined upon, open at all hours to the public and press, for the safe and speedy transmission of despatches, under proper regulations and at fixed minimum rates.

The Senate Committee upon Post-Offices and Post-Roads thereupon reported a resolution, which was passed February 23, 1866, requesting the Postmaster-General to lay before the Senate information in regard to the expediency of establishing, in connection with the Post-Office Department, "telegraph lines along the principal mail routes by the Government, to be open to the public at minimum rates of charge" (Cong. Globe, part 2, 1st Sess., 39th Cong., p. 979).

Before the report called for by this resolution was laid before the Senate, a bill, which finally became the present Act of July 24, 1866, was introduced by Senator Sherman, of Ohio, to incorporate the National Telegraph Company, with power to construct and operate lines over and along any of the post-roads of the United States. In view of the great importance of this measure, the purpose of which, as Mr.

Sherman said, was to organize a company immediately to commence the construction of telegraph lines in the United States on the postal routes, he moved the reference of the bill to a select committee of five Senators, to be appointed by the chair. This motion being agreed to, the chair appointed Mr. Sherman (chairman), Mr. Clark, Mr. Harris, Mr. Brown and Mr. Nesmith members of the committee.

A few days afterwards, the report of the Postmaster-General, on the subject of a postal telegraph, was laid before the Senate, and it was referred on the fourth of June to this select committee. This report proved unfavorable to the expediency of connecting the telegraph with the postal service in the manner mentioned in the resolution of the Senate of February 23.

On the 7th of June, Mr. Sherman, from the select committee on the bill to incorporate the National Telegraph Company, reported a bill "*to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes*," which proposed to authorize the National Telegraph Company to exercise the rights and privileges mentioned in the present Act of 1866.

On the 27th of June the Senate resumed the consideration of the bill, when Mr. Grimes, of Iowa, for the purpose of making a general law on the subject of telegraphs, moved an amendment to the bill by which the words confining the benefits of the act to the National Telegraph Company were stricken out, and the franchises, intended to be granted to that company, were conferred upon "*any telegraph company now organized, or which may hereafter be organized, under the laws of any State in this Union.*"

The amendment was agreed to and the bill as

amended, after full discussion, passed the Senate. On July 11th, it was reported to the House by the Committee on Post-Offices and Post-Roads and passed that body. The bill was supported and opposed in Congress, in the view that the avowed intention and effect of the measure were to make the erection of telegraph lines *on all the post-roads of the United States, free to all corporations accepting the restrictions and obligations imposed by that Act.*

It is noteworthy that this view of the act is announced by Justice HARLAN in United States vs. Union Pacific Ry. Co. cited *ante*, in the following language:

"The object of that act was not only to promote and secure the interests of the Government, but to obtain for the benefit of the people of the entire country every advantage in the matter of communication by telegraph which might come from competition between corporations of different States."

In the brief filed by the Pennsylvania Railroad Company in the Court below (p. 28), the suggestion is made that little importance is to be attached either to the *title of the act*, or to the proceedings in Congress relating to the bill in order to determine its meaning. This Court, however, has taken a different view of a matter of this sort where the meaning of the act is uncertain or doubtful. In the case of Holy Trinity Church vs. U. S. (143 U. S., 457), Mr. Justice BREWER thus comments upon the effect of the language used in the title of an act and the discussions attending the passage of an act:

"Among other things which may be considered in determining the intent of the legislature, is the title of the act. We do not mean that it may be used to add to or take from the body of the statute (Haddon v. Collector, 5 Wall., 107) but it may help to interpret its meaning." In the case of the United States

vs. Fisher, 2 Cranch, 358, 386, Chief-Justice MARSHALL said: "On the influence which the title ought to have on considering enacting clauses, much has been said; and yet it is not easy to discern the point of difference between the opposing counsel in this respect. Neither party contends that the title of an act can control plain words in the body of the statute; and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain nothing is left to construction. Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration."

And in the case of United States vs. Palmer (3 Wheat., 610, 631), the same Judge applied the doctrine in this way: "The words of the section are in terms of unlimited extent. The words 'any person or persons' are broad enough to comprehend every human being. But general words must not only be limited to cases within the jurisdiction of the State, but also to those objects to which the legislature intended to apply them. Did the legislature intend to apply these words to the subjects of a foreign power, who in a foreign ship may commit murder or robbery on the high seas? The title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislature. The title of this act is, 'An act for the punishment of certain crimes against the United States.' It would seem that offences against the United States, not offences against the human race, were the crimes which the legislature intended by this law to punish."

* * * * * *

"It will be seen that words as general as those used in the first section of this act were by that decision limited, and the intent of Congress with respect to the act was gathered partially, at least, from its title. Now, the title of this act is "An Act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories, and the District of Columbia." Obviously the thought expressed in this reaches only to the work of the manual laborer, as distinguished from that of the professional man. No one reading such a title would suppose that Congress had in its mind any purpose of staying the coming into this country of ministers of the gospel, or, indeed, of any

class whose toil is that of the brain. The common understanding of the terms labor and laborers does not include preaching and preachers; and it is to be assumed that words and phrases are used in their ordinary meaning. So whatever light is thrown upon the statute by the language of the title indicates an exclusion from its penal provisions of all contracts for the employment of ministers, rectors and pastors.

"Again another guide to the meaning of a statute is found in the evil which it is designed to remedy and for this the Court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body. *United States v. Union Pacific Railroad*, 91 U. S., 72, 99.

* * * * * *

"It appears also from the petitions and in the testimony presented before the committee of Congress, that it was this cheap, unskilled labor which was making the trouble, and the influx of which Congress sought to prevent. It was never suggested that we had in this country a surplus of brain toilers, and, least of all, that the market for the services of Christian ministers was depressed by foreign competition. Those were matters to which the attention of Congress, or of the people, was not directed. So far, then, as the evil which was sought to be remedied interprets the statute, it also guides to an exclusion of this contract from the penalties of the act."

Then after quoting from the report of the Senate Committee recommending the passage of the bill under consideration, in which occurs an explanation of the meaning of the terms "labor" and "service" in the body of the bill, and in which the committees expressed the belief that the bill in the form in which it was finally passed would be construed as including only persons whose labor or service was manual in character, and also referring to the report of the committee of the House, explaining the purpose of the passage of the bill which was to reach only a particular class of immigrants, Judge BREWER concludes thus:

"We find, therefore, that the title of the act, the evil which was intended to be remedied, the circumstances surrounding the appeal to Congress, the reports of the committee of each house, all concur in affirming that the intent of Congress was simply to stay the influx of this unskilled, cheap labor."

It is to be noted further that Mr. Justice BREWER starts upon the consideration of the meaning of the language of the act by the statement that the act of Trinity Church in importing its rector, Rev. E. Walpole Warren, was within the letter of the section of the act under consideration. He says:

"It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words labor and service both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added "of any kind"; and, further, as noticed by the Circuit Judge in his opinion, the fifth section, which makes specific exceptions, among them professional actors, artists, lecturers, singers and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section."

Notwithstanding all this, such force and effect was given by this Court to the title of the act, the debates, reports of committee, and general contemporaneous events that this general language of the first section of the act was limited in its application, contrary to its natural and ordinary meaning.

The same aids to construction were resorted to in the case of Coosaw Mining Co. vs. South Carolina

(144 U. S., 559). Also in the case of Price vs. Forrest (173 U. S., 410), in which HARLAN, J., in the opinion, at page 427, thus states the rule:

"Now it is said that the grounds upon which, in Emerson vs. Hall, the claim of the heirs was sustained, exist in the present case; that Price did not act under any law, nor in virtue of any authority, and that his acts imposed no obligation in law or equity upon the Government that could have been enforced, even if suit could have been maintained against it. And the conclusion sought to be drawn is that Congress must have intended by the act of 1891, as it was held to have intended by the act in *Emerson's case* to legislate for the benefit of the heirs or next of kin of the decedent and not for his personal representatives. But there were other facts in the *Emerson case* which placed that case upon peculiar grounds. Emerson and Lorrain were both dead when the act of March 3, 1831, was passed, and therefore Congress must have had in mind the question whether the Emerson and Lorrain portions of the money on deposit in court should be given to their respective heirs or not. And the question was solved as indicated by the preamble of that act. The preamble distinctly says that Congress had in view the *heirs*, and not those who would administer the estate, of the two persons whose meritorious services were recognized. Although a preamble has been said to be a key to open the understanding of a statute, we must not be understood as adjudging that a statute, clear and unambiguous in its enacting parts, may be so controlled by its preamble as to justify a construction plainly inconsistent with the words used in the body of the statute. We mean only to hold that the preamble may be referred to in order to assist in ascertaining the intent and meaning of a statute fairly susceptible of different constructions. (United States vs. Fisher, 2 Cranch, 358, 386; United States vs. Palmer, 3 Wheat, 610, 631; Beard vs. Rowan, 9 Pet., 301, 317; Holy Trinity Church vs. United States, 143 U. S., 457, 462; Coosaw Mining Co. vs. South Carolina, 144 U. S., 550). In Emerson's case, the decision was placed partly on the ground that the title of the act of 1831 indicated that Congress, in using the words "legal representatives" in the body of the act, had in mind

the heirs of Emerson and Lorrain, and not technically their "personal representatives."

See
" Emerson vs. Hall, 13 Pet., 409, 413.
" Wilson vs. Spaulding, 19 Fed. Rep., 304.
" Hahn vs. Salmon, 20 Fed. Rep., 801.

While to ascertain the meaning of an act, the mere discussion in Congress is not given special weight in some of the decisions of this Court, yet reference is frequently made to reports of committees for the purpose of confirming the construction adopted by the Court.

Hepburn vs. Griswold, 8 Wall., 610.
Untermeyer vs. Freund, 50 Fed. Rep., 80.
Northern Pac. Ry. Co. vs. U. S., 36 Fed. Rep., 285.
U. S. vs. Union Pac. R. R. Co., 37 Fed. Rep., 554.

In Austin vs. U. S. (25 Court of Claims, 454), the Court said :

" It seems to us, in view of all the authorities, that a report of a committee of either House of Congress, unanimous in its character, submitting an accompanying amendment to the bill, may be considered by the Court in construing such amendment, in case of doubtful interpretation."

So, likewise, the actual proceedings of Congress may be looked to, and were considered in the case of the U. S. vs. Burr, 159 U. S., 85, as practically determining whether the statute under consideration in that Case had a retrospective action, or a prospective effect only.

Nature of "Right" Granted in Section 1, Act of July 24, 1866.

Looking, therefore, to all these aids, it is evident that it was the intention of Congress, as expressed in the title of the act, to grant something to any telegraph company which should accept the provisions of the act, in return for the benefits which the United States contracted in the subsequent sections of the act it should receive. In the first section of the act, where it expressly provides that

> "Any telegraph company now organized, or which may hereafter be organized, under the laws of any State, shall have the right to construct, maintain and operate lines of telegraph over and along any of the military or post-roads of the United States,"

evidently Congress intended to confer something which the telegraph company, accepting the provisions of the act, prior to acceptance, did not have; and the question in this case is, What was thus granted?

If, in the case of a highway, which is a post-road of the United States by Act of Congress, the right to construct, maintain and operate telegraph lines thereon is dependent upon the will of the State or the city, as the owner of the highway, and the telegraph company can constract only after receiving the consent of such owner or custodian, then Congress has granted nothing, because the act means simply the permission to the telegraph company to construct its lines, if it acquires the permission of the owner of the post-road. Having the permission of the owner, the telegraph company would not need the permission of Congress, and, therefore, the act upon

this construction confers nothing upon the telegraph company.

On the other hand, if in the case of the post-road—a line of railway—the telegraph company can construct, operate and maintain a line of telegraph only upon the consent of the railway company, owner of such post-road, first obtained, and upon such terms as such railway company sees fit to grant, then nothing is granted to the telegraph company by the Act of Congress, because, having the consent of the railway company to build along its lines, and being an agency of interstate commerce, as held by the Supreme Court, (Paul vs. Virginia, 8 Wall., 168; Telegraph Co. vs. Telegraph Co., 96 U. S., 1; Telegraph Co. vs. Texas), it would not need an Act of Congress to enable it to construct, maintain and operate its telegraph lines even in a State foreign to its creation and organization; a construction which would make the pretended grant in the first Section of the act of Congress meaningless.

We are, therefore, driven to the position that, either this act is a mere naked permission to the telegraph company accepting its provisions to do certain things which it could do without such permission, provided it gets the authority or consent of other parties thus to act, or that Congress intended to grant to it the power to do something by the act, as against the State or municipality, as the owner of the public highways, or as against the railway company, as the owner of other forms of highways, which, without such Act of Congress, the telegraph company could not do. If the latter, we submit that, although Congress has not added a method of determining the amount of compensation which should be accorded to the owner of the highway in any particular case, whether a railway

company, or a State or a city; yet, as decided in the St. Louis Case, and the other cases above cited (*ante*, pp.), it is not for the owner of the highway alone to determine the amount of such compensation, but the Courts are open to determine the reasonableness of the amounts claimed and to determine the amount to be paid in any given case.

There is another phase of this question which we suggest for consideration, although it is not necessary that the Court should go to the extent to which the position about to be stated would lead us, in order to sustain the right which the Western Union insists upon in this case. The bill in this case shows, and it is uncontradicted and uncontradictable, that the railways over and along which it is desired to acquire the right to continue to maintain and operate telegraph lines, by the statutes of their creation, are public highways. It is very clear that the railway companies, in taking the land originally authorized by the State to be taken, and in all subsequent acquisitions of land for the purpose of these railways thus made public highways, were public agents, and the land was taken by the Government, and in the eye of the law as completely subjected to public uses, as though it had been taken by the State itself. The railway companies, as such, could acquire no land in connection with the operation of their railways, which was not thus subjected to the public uses and purposes, as much so as though it were taken for a turnpike or highway. The difference between a railway and an ordinary highway is not a legal difference, but is a difference of the kind of use to which the highway is subjected; in the one case

wheel vehicles drawn by horses; in the other to steam vehicles drawn by locomotives along and upon iron rails. Each is equally open to the public; in the one case without toll, because the State, by taxation, has raised the money from the citizens for the payment of the expenses of the highway; in the other cases the State has delegated to an agent the privilege of constructing the highway, and the franchise of collecting tolls from the public to use the highway; but the public in each case, subject to the varying conditions, are all alike equally entitled to use the highway. This being so, each of these species of highways, in its relations to the Congress, under the provisions of the Constitution of the United States, authorizing Congress to regulate commerce between the States and with foreign nations, and also giving it control over post offices and post roads, is equally subject to Congressional control, and Congress, as to each, possesses the same power of regulation (*In re* Debs, 158 U. S., 564).

The charters under which the constituent companies were organized, and which measure the conditions under which those companies acquired the right of way which they now occupy, expressly create these railways as "public highways." In the act to incorporate the New Jersey Railroad and Transportation Company, passed March 7, 1832, the Legislature of New Jersey, in Section 6, granted to the president and directors of said corporation all the rights and powers necessary to the survey, laying out, constructing and repair of a railroad, and provided that if they were unable for such purpose to acquire the land of the owner or owners at a price to be mutually agreed upon between them, then they might appoint three disinterested commissioners to appraise the value of the lands

which would be required by them for the construction of the railroad, with the provision in said section—

" that in case the said company, after the same is completed, shall abandon said road, or any part thereof, or cease to use and keep the same, or any part thereof, in repair, for three successive years, that then, and in that case, this charter shall be annulled and the title to the lands over which the said road shall pass, shall be revested in the person or persons from whom the lands were taken by concession or by inquisition, as aforesaid, their heirs or assigns; *And provided further*, if the state of New Jersey shall take possession of said road, then the said road and the title to the said lands shall be, and hereby is, vested in the state of New Jersey, so long as they shall maintain the same."

The public character of the corporation and its relation to the public as a highway is brought out still more clearly in Section 8, as follows:

" SEC. 8. *And be it enacted*, That the said president and directors shall have power to charge and demand tolls and rates for the passage of all carriages upon the said railroad or roads, and to fix, make, and at pleasure, change and alter such tolls and rates, and also to make regulations and rules for the collection and levying of the same, and to regulate the time and manner of transporting goods and passengers, and manner of collecting tolls on the said railroad, and also the description and formation of carriages that shall or may be used on said railroad, and all necessary machines, engines, wagons, carriages or vehicles: *Provided*, that the said corporation shall cause the rates of tolls charged to be inscribed or painted in some conspicuous place at each gate where toll shall be required to be paid: *Provided also*, that the tolls so charged, shall at no time, exceed the following rates, viz.: for an empty carriage with its appendages, weighing less than one ton, two cents per mile; above one and under two tons, four cents per mile; above three tons or more, eight cents per mile; and the following additional tolls for passengers and freight, viz.: in the carriages as charged as aforesaid, for every species of property, six cents per ton per mile, and three cents per mile for each and every passenger

carried on said railway, in said carriages; *And provided also*, that no farmer belonging to this state, shall be required to pay any toll for the transportation of the produce of his farm to market over the said road or roads, in his own carriage, weighing not more than one ton, when the weight of such produce shall not exceed one thousand pounds, but the said farmer may be charged toll as for an empty carriage: *Provided, also*, that it shall be lawful for the said company to erect and build a branch railroad from their present route, or railroads, to any landing on or near the Passaic River, not north of Bellville, or to any point or points within the township of Newark, as may be deemed expedient, and to charge tolls thereon, in the same manner, and at the same rate, as this corporation is authorized to charge."

One may look in vain through this charter or the other charters for any suggestion of any right or power in the corporation thus created to acquire or hold any land except for the purposes enumerated in the act for which the corporation was incorporated and subject to the obligations named in the act with respect to the uses of such property. In no respect is the right of private ownership of property recognized in the charters of the constituent companies from which the defendant companies derive their right to acquire and hold property and by which they have acquired and now hold the property through the State of New Jersey. They hold this property and have acquired it not in any private capacity, and have no private ownership thereof, but as public agents, and the lands which they have thus acquired are all equally and alike subject to the obligations to the public as defined by these charters, and subject to the power of Congress in any matter consistent with the general purpose for which these lands were taken.

In Civil Rights Cases, 109 U. S., 3, in the dissenting opinion, Mr. Justice HARLAN thus clearly outlines the

effect of the decisions as to the relation of a railway corporation to the public (p. 37):

"FIRST, as to public conveyances on land and water. In *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How., 344, this court, speaking by Mr. Justice NELSON, said that a common carrier is 'in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the consent of the parties concerned.' To the same effect is *Munn v. Illinois*, 94 U. S., 113. In *Olcott v. Supervisors*, 16 Wall., 678, it was ruled that railroads are public highways, established by authority of the State for the public use; that they are none the less public highways, because controlled and owned by private corporations; that it is a part of the function of government to make and maintain highways for the convenience of the public; that no matter who is the agent or what is the agency, the function performed is *that of the State;* that although the owners may be private companies, they may be compelled to permit the public to use these works in the manner in which they can be used; that, upon these grounds alone, have the courts sustained the investiture of railroad corporations with the State's rights of eminent domain, or the right of municipal corporations, under legislative authority, to assess, levy, and collect taxes to aid in the construction of railroads. So in *Township of Queensbury v. Culver*, 19 Wall., 83, it was said that a municipal subscription of railroad stock was in aid of the construction and maintenance of a public highway, and for the promotion of a public use. Again, in *Township of Pine Grove v. Talcott*, 19 Wall., 666: 'Though the corporation [railroad] was private, its work was public, as much so as if it were to be constructed by the State.' To the like effect are numerous adjudications in this and the State courts with which the profession is familiar. The Supreme Judicial Court of Massachusetts, *Inhabitants of Worcester v. The Western R. R. Corporation*, 4 Met., 564, said in reference to a railroad:

"'The establishment of that great thoroughfare is regarded as a public work, established by public authority, intended for the public use and benefit, the use of which is secured to the whole community, and constitutes, therefore, like a canal, turnpike, or highway, a public easement. * * * It is true that the

real and personal property, necessary to the establishment and management of the railroad, is vested in the corporation; but it is in trust for the public.'" In *Erie, Etc., R. R. Co. vs. Casey*, 26 Penn. St., 287, the court referring to an act repealing the charter of a railroad, and under which the State took possession of the road, said:

"'It is a public highway, solemnly devoted to public use. When the lands were taken, it was for such use, or they could not have been taken at all. * * * Railroads established upon land taken by the right of eminent domain by authority of the commonwealth, created by her laws as thoroughfares for commerce, are her highways. No corporation has property in them, though it may have franchises annexed to and exercisable within them.'

"In many courts it has been held that because of the public interest in such a corporation the land of a railroad cannot be levied on and sold under execution by a creditor. The sum of the adjudged cases is that a railroad corporation is a governmental agency, created primarily for public purposes, and subject to be controlled for the public benefit."

In Wisconsin, &c., R. R. Co. vs. Jacobson, 179 U. S., 287, Justice PECKHAM, at page 296, says:

"Railroads have from the very outset been regarded as public highways, and the right and the duty of the government to regulate in a reasonable and proper manner and the conduct and business of railroad corporations have been founded upon that fact. Constituting public highways of a most important character, the function of proper regulation by the government springs from the fact that in relation to all highways the duty of regulation is governmental in its nature. At the present day there is no denial of these propositions. Olcott v. Supervisors, 16 Wall., 678, 694; Cherokee Nation v. Southern Kansas Railway Company, 135 U. S., 641; United States v. Joint Traffic Association, 171 *Id.* 505-569, 570; Lake Shore Railway Company v. Ohio, 173 *Id.*, 285, 301.

"It is because they are such highways that the land upon which the rails are laid, and also that which may be necessary for the other purposes of the corporation, is said to be used for a public purpose, and on that ground the power of eminent domain which is given

them is held to be a constitutional exercise of legislative authority. The right of the legislature to tax in furtherance of such use is founded upon the same considerations that the use is a public one, and therefore taxation in support of such use is valid. *Olcott* v. *Supervisors*, *supra*. The companies hold a public franchise, and governmental supervision is therefore valid. They are organized for the public interests and to supervise primarily the public good and convenience."

In Lake Superior & Mississippi R. R. Co. vs. U. S., 93 U. S., 442, Mr. Justice BRADLEY very carefully analyzed and considered the status of railways and especial attention is invited to the learned opinion in which he sets forth with some detail the legislative history of the earlier railway companies, concluding as follows:

"Be this, however, as it may, the general course of legislation referred to sufficiently demonstrates the fact, that in the early history of railroads it was quite generally supposed that they could be public highways in fact as well as in name. This view pervaded the language of most charters granted at that period, many of which still remain in force; and the railroads constructed under them are, theoretically, at least, public highways to this day. This fact affords the only explanation of much of the language used, not only in those early charters, but in many of those which have been granted since, the latter adopting, as was natural, the forms of phraseology found prepared to hand. The language referred to is only consistent with the idea that railroads were to be regarded and used as public highways. The forms of legislative expression thus adopted, and coming down from a period when they had greater practical significance than they now have, bring with them an established sense, which renders them free from all uncertainty and doubt. We know, as well as we know the sense of any phrase in the English language which has historical meaning and application, what is meant when a railroad is spoken of in a law as a 'public highway.' We know that it refers to the immovable structure stretching across the

country, graded and railed for the use of the locomotive and its train of cars." * * *

"In view of the legislative history and practice referred to, it seems impossible to resist the conclusion, when we meet with a legislative declaration to the effect that a particular railroad shall be a public highway, that the meaning is, that it shall be open to the use of the public with their own vehicles."

Among the charters to which Mr. Justice BRADLEY refers in the opinion referred to is the charter of the Camden & Amboy R. R. Co., the charter of the New Jersey Railroad Company, and the charter of the Philadelphia & Trenton R. R. Co., referred to and set forth in the bill in this case.

That the railroad of the Pennsylvania Railroad Company is a public highway, within the meaning of the Act of Congress of July 24, 1866, authorizing telegraph companies to construct, maintain, and operate lines of telegraph over and along any of the military or post-roads of the United States, which have been or may hereafter be declared such by Act of Congress, is susceptible of demonstration, and, has been, in fact, so decided by the Supreme Court of the State of Pennsylvania.

The Pennsylvania Railroad Company was chartered on the 13th day of April, 1846 (Pamphlet Laws of Pennsylvania, 1846, p. 312). Section 21 of the charter being as follows:

SECTION 21. That upon the completion of said railroad, or any part thereof, the same shall be esteemed a public highway, for the conveyance of passengers and the transportation of freight, subject to such rules and regulations in relation to the same, and to the size and construction of wheels, cars, and carriages, the weight of loads, and all other matters and things connected with the use of said railroad, as the president and directors may prescribe and direct:

Provided, that the said company shall have the exclusive control of the motive power, and may from time to time establish, demand, and receive, such rates of toll or other compensation, for the use of the said road, and of said motive power, and for the conveyance of passengers, the transportation of merchandize and commodities, and the cars or other vehicles containing the same, or otherwise, passing over or on said road, as to the president and directors shall seem reasonable; *Provided, however, nevertheless*, That said rates of toll and motive-power charges, so to be established, demanded or received, when the cars used for such conveyance or transportation are owned or furnished by others, shall not exceed two and a half cents per mile for each passenger; three cents per mile for each ton of two thousand pounds for freight; three cents per mile for each passenger or baggage car, and two cents per mile for each burden or freight car, every four wheels being computed a car; and in the transportation of passengers no charge shall be made to exceed three cents per mile for through passengers, and three and a half cents per mile for way passengers."

The Supreme Court of Pennsylvania, in the case of Trunick vs. Smith (63 Pa. St. Reps., p. 18, 1869), referring to the aforesaid charter of the Pennsylvania Railroad Company, says (p. 22):

"Under the charter of the Pennsylvania Railroad Company, Pamphlet Laws of 1846, page 323, the railroad is made a public highway, which may be used by persons owning their cars, the company furnishing the motive power."

People's Telephone Company vs. President, &c., of Berks and D. Turnpike Road, 49 Atlantic Reporter (199 Pa. St., 411, 1901), decided that a telephone company incorporated under the General Corporation Act of April 29, 1874, and its supplements, is a telegraph company, and a turnpike is a highway, within the meaning of that act, providing that a telegraph company incorporated thereunder may construct its lines

along any highway. In that case the Court, after stating that the telephone company was duly incorporated and was proceeding to construct its line of telephone through the City and County of Lebanon, thus states the facts of the case:

"The defendant company is a corporation duly incorporated under and by virtue of the act of general assembly of the commonwealth of Pennsylvania, approved March 2, 1805, and its several supplements, for the purpose of making an artificial road from the River Schuylkill at Reading, in the County of Berks, to or near Hummelstown, in the county of Dauphin, which it located and constructed, and since its completion maintains and operates as a public highway, and which traverses the said city and county of Lebanon. The plaintiff company has located a line, connecting with their constructed line in the said city of Lebanon, from a point in the township of North Lebanon, near the corner of Front street, in the said city of Lebanon, and the Berks & Dauphin Turnpike Road, to the village of Avon, in said township, close to the fence on the north side of said turnpike road, but not on the traveled part, nor on the roadbed thereof, and in line with the poles of the Western Union Telegraph Company; the poles proposed to be erected by the plaintiff company to be ten feet higher than those of said telegraph company. The plaintiff company proceeded to erect its poles on the line located as above set forth. The first pole was put up at the corner of said turnpike road and the first road running north beyond the railway crossing at Avon, and other poles were distributed along said located line. On December 20, 1899, the defendant company cut down and removed the said pole erected by the plaintiff, and also removed a number of other poles which the plaintiff intended to use in the construction of its located line; and the defendant company has expressed its determination and intention to resist the erection of any poles along the line of said turnpike road located as aforesaid, and has threatened to cut down and remove any poles which the plaintiff may erect, and which are necessary for the purpose of operating said telephone line. The erection and construction of the said telephone line on the line as located on the north side of said turnpike road by

the plaintiff company will not incommode the public use and travel on the said turnpike.

"The authority under which the plaintiff proposes to erect its telephone line on defendant company's turnpike road is statutory, and the statutes applicable are: The general corporation act of April 29, 1874, which in section 33 provides as follows: 'The charter for the incorporation of a company to maintain a telegraph line shall, in addition to what is hereinbefore required, also state: (1) The general route of the line of telegraph; (2) the points to be connected. Clause 1. Such incorporation shall be authorized, when incorporated as hereinbefore provided, to construct lines of telegraph along and upon any of the public roads, streets, lands, or highways, or across any of the waters within the limits of this state, by the erection of the necessary fixtures, including posts, piers, or abutments for sustaining the cords or wires of such lines, but the same shall not be so constructed as to incommode the public use of said roads, streets or highways, or injuriously interrupt the navigation of said waters; and this act shall not be so construed as to authorize the construction of a bridge across any of the waters of this state."

After stating that under the statutes of Pennsylvania the telephone was regarded as a species of telegraph, and that the telephone company is a telegraph company within the meaning of the legislation of Pennsylvania, the Court continues as follows:

"That the highways of the state are within the control of the legislature is well settled. The legislature has full power and jurisdiction over the highways of the state, and may consent to their use, by legislative enactment, for the purposes of telephone lines, as a means to facilitate communications in the daily transactions of business, not only between the citizens of the same community, but of citizens of one community with those of another, and thereby accommodating the public at large. The defendant company's turnpike road was located and constructed by virtue of legislative enactment and for public purposes, and as we said in Northern Cent. Ry. Co. v. Com., 90 Pa., 306: 'It differs from a common highway in the fact that it is not constructed in the first instance at the public ex-

pense, and the cost of construction is reimbursed by the payment of toll imposed by authority of law. Its use is common to all who comply with the law. Common understanding and public policy unite in requiring us to hold that a turnpike is a public highway.' A turnpike road can be constructed and opened under authority of law only. When used by the public it becomes a public highway. Pittsburgh, M. & Y. R. Co. v. Com., 104 Pa., 583. Judge RICE in McManus' Appeal, 5 Pa. Super. Ct., 65, says: 'Nothing is better established than that a turnpike road is a public highway, and every traveler has the same right to use it upon payment of toll established by law as he would have to use any other public highway.' The plaintiff company therefore is authorized under the laws of the commonwealth to locate and construct a telephone line on the public highway known as the Berks & Dauphin Turnpike Road, in the county of Lebanon, and, if located so as not to incommode the used of said public highways, the defendant company cannot be permitted to interfere with its construction and operation as threatened. What has already been done by the defendant by way of interfering with plaintiff in its construction of its telephone line can be compensated in damages, and a court of equity would not interfere; but what is threatened by the defendant to be done if the plaintiff proceeds to do what under the law it has a right to do, viz., erect and construct its telephone line as located, demands the exercise of the restraining power of the court and warrants interference by injunction. And now, February 15, 1900—the above cause coming on to be heard on January 26, 1900, on bill, answer and proofs—it is ordered, adjudged and decreed as follows: That the defendant corporation, its officers, managers, agents and employees, it, they and each of them are hereby restrained and enjoined hereafter from cutting down, overthrowing and removing any of its poles and fixtures which the plaintiff may erect to sustain the wires of its proposed line, and from interfering with the erection or maintenance by the plaintiff of said poles and fixtures along the north side of said turnpike road close to the fence, not on the traveled part nor on the roadbed thereof, nor at any place which will not incommode the public use and travel on said public highway. It is further ordered that the defendant pay the costs of this proceeding."

This was the opinion of the Court below, and the Supreme Court of Pennsylvania affirmed the judgment upon the foregoing opinion, *per curiam*, after careful consideration.

By referring to the charter of the Turnpike Co. it will be seen that the act of March 2, 1805 (Carey & Biorens Pennsylvania Laws, Vol. 7, p. 427), created a private turnpike company, giving it powers similar to those granted to the Pennsylvania Railroad Company in its charter, the only difference being the different class of property which was to be managed by the private corporation thus created. As regards the question we are considering, the essential features of the two acts are the same.

It is material to note here that this turnpike was not the conversion of an ordinary highway into a toll road, but was constructed upon lands acquired by the company for that purpose. In disposing of the case the Court held that the turnpike was a highway within the meaning of the constitution and laws of the State of Pennsylvania; and our contention is that if this artificial turnpike road was a highway, equally so are the railroads of the defendant railroad company. It is impossible to distinguish between the two cases.

On the general subject of whether telegraph lines are an additional servitude upon lands the fee of which is owned by a private person, but taken for a public highway, there is a conflict of opinion in the State courts. As to the streets of a city, it is generally held that they are not an additional servitude, even as against the private owner of the fee. In the ordinary highways, some courts hold that a telegraph line is an additional servitude as respects the owner of the fee. Others hold the reverse. So far as we know, this

point has not been settled in Pennsylvania. The decisions, pro and con, upon this subject have been collected by Mr. Edward Q. Keasbey, in a note to the case of Nichol vs. Telegraph Company, 7 Am. Electrical Cases, p. 277, which, for the convenience of the Court, we have copied below.* This case will also be found in 62 N. J. Law, p. 733.

Now, then, let us distinguish. So far as the public is concerned, no question has ever existed as to the power of the Legislature to authorize the occupation

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Note to Nicoll v. Teleph. Co., 62 N. J. L. 733, 7 Am. Electl. Cas. 283.

Are telegraph or telephone lines a new burden on the highway? There is much difference of opinion on this subject between the courts of different States. On the one side, it is argued that the easement of highway is in the last analysis for the purpose of intercommunication; not merely travel and transportation but also the transmission of intelligence, and that for this purpose the telegraph is only an improvement upon the post-horse or the mail-wagon; and on the other side it is contended that the streets were intended primarily for travel and transportation, and that the mode of transmitting intelligence by the telegraph is wholly different from the former use of the road and involves the permanent appropriation of the soil for poles, and that the landowner who dedicated his land for a road cannot be supposed to have contemplated that it should be used for this purpose without further compensation. See Keasbey on Electric Wires, secs. 89-90.

On the one side are the following cases: Gay v. Mutual Union Teleg. Co., 12 Mo. App. 485, 1 Am. Electl. Cas. 427; Forsythe v. B. & O. Teleg. Co., 12 Mo. App. 494; Pierce v. Drew, 136 Mass. 75, 1 Am. Electl. Cas. 571; Julia Building Ass'n v. Bell Teleph. Co., 88 Mo. 258, 1 Am. El. 801; St. Louis v. Bell Teleph. Co., 96 Mo. 623, 2 Am. Electl. Cas. 44; Irwin v. Great Southern Teleph Co., 37 La. Ann. 63, 1 Am. Electl. Cas. 709; Hewett v. W. U. Tel. Co., 4 Mackey (D. C.) 424, 2 Am. Elecl. Cas. 222, 2 Cent. Rep. 694; McCormick v. District of Columbia, 4 Mackey (D. C.) 396, 54 Am. Rep. 284 · Hershfield v. Rocky Mt. Bell Teleph Co., 12 Mont. 102, 4 Am. Electl. Cas. 72; People v. Eaton, 100 Mich., 208, 5 Am. Electl. Cas. 87, 24 L. R. A., 721, with note; Cater v. N. W. Exchg. Teleph. Co., 6 Minn. 539, 63 N. W. Rep. 111, 5 Am. Electl. Cas: 111; York Teleph. Co. v. Keesey, 5 Pa. Dist. Ct. R. 366, 6 Am. Electl. Cas. 107; Magee v. Overshiner, 150 Ind. 127, 49 N. E. Rep.

of highways by telegraph lines. The only question of conflict is whether as to the owner of the fee, where the owner of the adjoining land owns the fee of the highway, the erection of a telegraph line is an additional servitude. No such question is in this case, because it does not appear on this record that the defendant railroad companies own the fee of their right of way. If, therefore, the railroad of the defendant railroad companies is a highway and the railroad companies are not the owner of the fee, all the cases recognize the right

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951, 7 Am. Electl Cas. 241; Roake v. Am. Teleph. & Teleg. Co., 41 N. J. Eq. 35, 2 Am. Electl. Cas. 218 (wires without poles).

On the other side are the following cases: Dusenbury v. Mutual Teleg. Co., 1 Abb. N. C. (N. Y.) 440, 1 Am. Electl. Cas. 448; Metropolitan Teleph. & Teleg. Co. v. Colwell Lead Co., 67 How. Pr. 365, 50 N. Y. Super. Ct. 488, 1 Am. Electl. Cas. 662; Blashfield v. Empire State Teleph. & Teleg. Co., 71 Hun, 532, 24 N. Y. Supp. 1006, 4 Am. Electl. Cas. 92; Eels v. Am. Teleph. & Teleg. Co., 143 N. Y. 133, 5 Am. Electl. Cas. 92; Postal Tel. Cable Co. v. Bruen, 39 N. Y. Supp. 220, 6 Am. Electl. Cas. 120; Willis v. Erie Teleg. & Teleph. Co., 37 Minn., 347; Board of Trade Teleg. Co. v. Barnett, 107 Ill. 507, 27 Am. Rep. 453, 1 Am. Electl. Cas. 565; Smith v. Cent. Dist. Pr. & Teleg. Co. 2 Ohio C. C. R. 259, 2 Am. Electl. Cas. 237; Postal Tel. Cable Co. v. Eaton, 170 Ill. 513, 49 N. E. Rep. 365, 7 Am. Electl. Cas. .....; Am. Teleph. & Teleg. Co. v. Jones, 78 Ill. App. 372; Daily v. State of Ohio, 51 Ohio St. 348, 5 Am. Electl. Cas. 186; Pacific Postal Teleg. Co. v. Irvine, 49 Fed. Rep. 113, 4 Am. Electl. Cas. 140; Spokane v. Colby, 10 Wash. 610, 48 Pac. Rep. 248, 7 Am. Electl. Cas. .....; W. U. Teleg. Co. v. Williams, 86 Va. 896, 11 S. E. Rep. 106, 3 Am. Electl. Cas. 184; Chesapeake & Pot. Teleg. Co. v. Mackenzie, 74 Md. 36, 21 Atl. Rep. 600, 3 Am. Electl. Cas. 196; Stevens v. Postal Teleg. Cable Co., 68 Miss. 559, 9 So. Rep. 356; Theobald v. Railway Co., 66 Miss. 279, 6 So. Rep. 356; Am. Teleph. & Teleg. Co. v. Pearce, 71 Md. 535, 18 Atl. Rep. 910, 3 Am. Electl. 169 (telegraph along a railway).

The subject is discussed in Lewis Em. Dom. sec. 131; Dillon Mun. Corp. (4th ed.) secs. 698, 698*a*; Elliott on Roads and Streets, pp. 583-6; Randolph on Eminent Domain, pp. 229-235, and in the notes in 2 Am. R. R. & Corp. Rep. 258-268, 1 *id.* 73-86, 2 *id.* 56, 28 Am. St. Rep. 229-235, and Keasbey on Electric Wires, chap. VIII.

Whether or not the telegraph line is a new burden on the land,

of the proper legislative department to authorize the construction of a telegraph line without any compensation, and such construction is not regarded as the taking of any private property for which the constitutional right to compensation exists. If, in the construction of the line, any damage is done to the railroad company or to the adjoining proprietor, there is imposed a liability to pay such damage.

The Act of Congress of July 24, 1866, conferring the right upon the telegraph company to construct, main-

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the owner has a right to compensation for any substantial obstruction to his light, air or access. Keasbey on Electric Wires, sec. 105; H. Clausen & Sons Brewing Co. v. B. & O. Teleg. Co., 2 Am. Electl. Cas. 210; Zehren v. Milwaukee Elec. Ry. & Lt. Co., 99 Wis. 83, 74 N. W. Rep. 538, 7 Am. Electl. Cas. .....; Jaynes v. Omaha St. Ry. Co., 53 Neb. 631, 74 N. W. Rep. 67, 7 Am. Electl. Cas. .....; and it has been held that he is entitled to compensation for injury to trees along the roadside. Board of Trade Teleg. Co. v. Barnett, 107 Ill. 507, 1 Am. Electl. Cas. 505; Dailey v. Ohio, 51 Ohio St. 348, 5 Am. Electl. Cas. 186; Clay v. Post. Tel. Co., 70 Miss. 406, 7 So. 658, 4 Am. etc. 224; McCruder v. Rochester St. Ry. Co., 28 N. Y. Supp. 13, 4 Am. Electl. Cas. 224; and, on the other hand, *it has been held that even assuming the telegraph line to be a new burden, the right of the landowner in trees in the street is subject to municipal needs with respect to a fire-alarm telegraph.* Southern Bell Teleph. Co. v. Francis, 100 Ala. 224, 6 Am. Electl. Cas. 160, 19 So. Rep. 1; Southern Bell Teleph. Co. v. Constantine, 61 Fed. Rep. 61, 4 Am. Electl. Cas. 319; and also that the telegraph company is liable for wanton or unnecessary damage. Tissot v. Great Southern Teleph. & Teleg. Co., 39 La. Ann. 996, 3 So. Rep. 261, 2 Am. Electl. Cas. 286; Gorham v. East Chester Elec. Co., 80 Hun 290, 30 N. Y. Supp. 128, 5 Am. Electl. Cas. 199; Hoyt v. Southern New England Teleph. Co., 60 Conn. 388; Poston v. Cumberland Teleg. & Teleph. Co., 94 Tenn. 696, 5 Am. Electl. Cas. 203; Postal Teleg. Co. v. Lenoir, 107 Ala. 640, 18 So. Rep. 266, 6 Am. Electl. Cas. 167, note; Postal Tel. Co. v. Brantley, 170 Ala. 683, 18 So. Rep. 321; Bradley v. So. New England Teleph. Co., 66 Conn. 559, 34 Atl. Rep. 499, 6 Am. Electl. Cas. 152; O'Connor v. Nova Scotia Teleph. Co., 22 Canada Sup. Ct. Rep. 276; Gilchriat v. Dominion Teleg. Co., Sup. Ct. New Brunswick, 3 Pugsley & Burridge, 553, affirmed Supreme Court Canada, 2 Am. Electl. Cas. 298, note.—E. Q. K.

tain and operate their telegraph lines upon the military and post-roads of the United States, wisely omitted to make any provision in regard to assessment of damages or compensation, leaving that to be determined in each particular case by the facts and the laws applicable to such particular case. If in any given case there was a taking of the property of the railway company—"taking" within the constitutional sense—then, under the Constitution, compensation would have to be made therefor. If, in the constitutional sense, there was no taking of private property by the occupation of the highway as a railroad or highway or post-road by the telegraph company, then they would have the right to occupy it without making any payment, provided that it did no damage to the primary use.

We refer to these considerations, but it will be observed that in the present case the telegraph company offered to pay, and is willing to pay any compensation that may be adjudged that the railroad companies are entitled to.

In Section 1 of the Act of Congress of July 24, 1866, Congress was therefore dealing with property all of which was within Congressional control, to wit, the public domain of the United States, the military or post-roads of the United States, and the navigable waters of the United States. The Pensacola case, held that all of each of the classes of property thus subject to Congress were brought within the scope of this act. In the mind of Congress, they are all alike in one respect, to wit, that they are all devoted to the public use, and belong to the public. As such, Congress could deal with them, and did attempt to deal with them in this act, without any classification of the

classes of public domain, or post-roads, or navigable waters.

The language employed by Mr. Chief Justice WAITE in construing the act in the Pensacola case, to the effect that

"the use of public property alone is granted, and if private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the constitution is not interfered with. Only national privileges are granted"—

is consistent with the telegraph company's construction of this act, upon the theory that railroad property, streets, highways, the public domain and navigable streams and waters of the United States stand upon an exact equality, so far as the power of Congress is concerned, and each and all, equally and alike, subject to the provisions of this act, because *public*, and not *private*, property.

When Congress therefore, in the exercise of its sovereign power of aiding a telegraph company, an instrumentality, which is at once an agent of interstate commerce and an agent of the Government of the United States, provides that such agent may attach itself to this highway, which is under the control of the railway company, without interference with the ordinary travel thereon, what, if anything, in the way of compensation is the railway company entitled to receive?

Mr. Justice Bradley's Great Decision.

A similar question in certain respects, has been very fully and clearly discussed in the case of Stock-

ton vs. R. R. Co. (32 Fed. Rep., 9), in the able opinion by BRADLEY, Justice. In this case Stockton, the Attorney-General of New Jersey, filed a bill to enjoin the railroad company, defendant, from constructing a bridge over Arthur Kill, between Staten Island and the State of New Jersey, upon the ground that the Staten Island Rapid Transit Railroad Company, defendant, was building a bridge and occupying, *with the piers thereof, lands under the Kill, the title to which was in the State of New Jersey.* The Staten Island Rapid Transit Railroad Company, a corporation of New York, claimed the right to build the bridge in question and to occupy the lands under water necessary for the support of its piers under an Act of Congress approved June 16, 1886, the essential provisions of which were as follows :

(1) "It shall be lawful for the Staten Island Rapid Transit Railroad Company, a corporation existing under the laws of the State of New York, and the Baltimore & New York Railroad Company, a corporation existing under the laws of the State of New Jersey, or either of said companies, to build and maintain a bridge across the Staten Island Sound, or Arthur Kill, from New Jersey to Richmond County, New York, for the passage of railroad trains, engines and cars thereon, and to lay on and over said bridge, railway tracks for the more perfect connection of any railroads that are or may be constructed to the said sound on or opposite said point ; and in case of any litigation concerning any alleged obstruction to the free navigation of said sound on account of said bridge the cause may be tried before the Circuit Court of the United States of either of said States in which any portion of said obstruction or bridge touches, and other railway companies desiring the use of said bridge shall have and be entitled to equal rights and privileges in the passage over the same, and in the use of the machinery and fixtures thereof and of all the approaches thereto, for a reasonable compensation, to be paid to the owners of said bridge, under and upon such terms and conditions as shall be prescribed by the Secretary of

War upon hearing the allegations and proofs of the parties, in case they shall not agree."

Section 2 required that the bridge should be constructed as a pivot draw-bridge, and made regulations as to the length of spans, elevation above mean low water-mark, and how the draw should be operated and the nature of the signal lights to be maintained thereon.

Section 3 provided that the bridge constructed under the act should be a lawful structure and recognized and known as a post route, open for transportation of mails and troops and munitions of war, at the same rate per mile as for other transportation over roads or public highways leading to the bridge.

Section 4 provided for the submission of the plans and location of the bridge, a detailed map of the sound, exhibiting the depths and currents to be submitted to the Secretary of War, and requiring his approval to the location and plans, and also of any changes in the plans of the bridge during the progress of the work thereon, and also giving the Secretary of War power to make any changes or alterations in the bridge, so that it should not obstruct navigation, even to the extent of the removal of the whole structure.

Section 5 reserved to Congress the right to alter, amend, or repeal the act.

It will be observed that the act nowhere makes any provision in terms for the appropriation of the rights or property of the State, and makes no provision for ascertaining the compensation to be paid to the State as the proprietor of the land under the navigable waters and necessarily to be occupied in the construction of the bridge.

The company, under the authority of this act, caused the plan and location of the bridge, with a detailed

map of the sound at or near the same, as required by the act, to be submitted to the Secretary of War, who duly approved the same. The company thereupon, by its engineer and contractors, proceeded to make preparations for laying the piers and erecting the bridge according to the plan and upon the location thus approved. Thereupon the Attorney-General of New Jersey filed an information to prevent the construction of the bridge. The information proceeded upon the theory—first, that the State was the owner of the shore and the land under water of all navigable streams and arms of the sea within its borders, and had the right of supreme dominion over the same; second, that this right of supreme dominion had never been ceded or surrendered to the United States, and that without such cession or surrender the United States could not take possession of the lands, or authorize other parties to do so, except by making compensation therefor, as provided in the Fifth Amendment to the Constitution.

It was further contended that, at the place of location of the bridge the ownership of the soil on the part of the State of New Jersey extended from ordinary high water-mark to the centre line of the sound, as being the boundary line between New Jersey and New York.

It was further contended in the information that the act of Congress could not be construed as intending to give any authority to take any portion of said lands without compensation; that the act must be construed as a mere license or permission to erect a bridge so far as Congress is concerned, leaving the companies named in the act to obtain from the State the usual authority to build the bridge on the territory and lands of the

State; that if the act should be construed as giving authority to erect the bridge without the consent of the State and without compensation for the lands taken in such construction, then it violates the Constitution of the United States, not only by authorizing the lands of the State so taken without compensation, but by enlarging the powers of a corporation created by the State itself, in case the bridge should be built by the Baltimore and New York Railroad Company, the same being a corporation under the laws of the State of New Jersey, because it authorized this railroad company to do what by its State charter and other laws of the State it was expressly prohibited from doing.

It was further contended that, if the other corporation, the Staten Island Rapid Transit Company, should construct the bridge, it had no authority from the State of New Jersey to exercise any corporate franchises within that State and could not, therefore, lawfully construct the bridge, because the comity of the State of New Jersey had not been accorded to it in that respect, but, on the contrary, an act of the Legislature of New Jersey prohibited such corporation from erecting a bridge without the permission of the Legislature of New Jersey first given by statute enacted for that purpose.

The answer advanced no materially new facts, except that the Staten Island Rapid Transit Railroad Company was building this bridge as a connecting link of a line of railroad extending from the Bay of New York across the States of New York, New Jersey, Pennsylvania and other States, as an instrument of commerce among the States, and that the Baltimore and New York Railroad Company had nothing to do with the proposed building of the bridge.

The case was originally brought in the State Court, in the Court of Chancery, and a preliminary injunction was granted by the Chancellor upon the bill and affidavits. The defendant railway companies removed the case to the United States Circuit Court as a case arising under the Constitution and Laws of the United States, and in that Court filed their answer and a motion to dissolve the injunction, but after argument the parties stipulated to submit the case as upon final hearing upon bill and answer, there being no controverted facts in the case.

The late Mr. Justice BRADLEY heard the case and announced the decision of the Court therein. After stating the facts as above given, he comes to the question of the capacity of the Staten Island Rapid Transit Railroad Company in the premises and examines the matter under the following heads:

FIRST. The true construction of the act of Congress on which the case arose, whether merely permissory or a grant of power to build.

SECOND. The capacity or right of the defendant, the Staten Island Rapid Transit R. R. Co. to perform any of the acts, or transact any business as a corporation in New Jersey.

THIRD. The power of Congress to authorize a railway company, a corporation of the State, to construct roads and other means of communication between the States, without the concurrence and consent of the States in which the structures are made.

FOURTH. Whether, under the act in question, the provisions of the Fifth Amendment to the Constitution of the United States were violated by making no provisions for compensation.

After passing upon the two preliminary questions,

Mr. Justice BRADLEY comes to consider that of compensation for lands taken and the power of Congress as respects the lands of the State and deals with it as follows:

"The most strenuous objection, however, to the exercise of the power in this case and in the manner proposed, is based on the fact that the piers of the bridge are to rest, and the bridge is to stand, on land which belongs to the State, and that no compensation is proposed to be made for the taking thereof. It is contended that, if the land of the State can be taken at all (which is denied), it can at most only be taken, like other property, after just compensation has been made.

"First, it is denied that the land of the State can be taken at all without voluntary cession or the consent of the state legislature. If this is so, we are brought back to the dilemma of requiring the consent of the State in almost every case of interstate line of communication by railroad, for hardly a case can arise in which some property belonging to a State will not be crossed. It will also be so at the passage of a navigable stream. This shows that the position cannot be sound, for it brings us to a *reductio ad absurdum*. It interposes an effectual barrier to the execution of a constitutional power vested in Congress. It overlooks the fundamental principle that the constitution, and all laws made in pursuance thereof, are the supreme law of the land; for, if the consent of a State is necessary, such State may always, in pursuit of its own interests, refuse its consent, and thus thwart the plain objects and purposes of the constitution.

"One argument for the position is that no part of the territory of one sovereign can be acquired by another except by conquest or cession; and, therefore, in a case like the present, where conquest is out of the question, it can only be acquired by cession; and this conclusion is supposed to be affirmed and provided for in our federal system by the seventeenth paragraph of section 8, art. 1, Const., which gives to congress power to exercise exclusive legislation 'over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful

buildings.' It is argued that this is the only constitutional method by which the United States Government can obtain the possession and use of lands within a state, especially of lands belonging to the state.

"The argument, however, is directed to the acquisition of territory, with exclusive jurisdiction over the same, and is entirely sound in that regard. But it does not touch the question as to the power of the United States to acquire the mere use of land without exclusive jurisdiction therein. Nearly all the powers of government are exercised over territory in which the United States and the several states have concurrent jurisdiction. It is only in exceptional cases that the United States desires to have exclusive jurisdiction, and a consequent cession of territory. It is very true that the consent of the state legislature is required in order to give the United States this exclusive jurisdiction. But that is all. It is not required when exclusive jurisdiction is not sought. On the contrary, the government, if it sees fit, may condemn land for its purposes without the consent of the state. Thus it was decided by the supreme court in the case of *Kohl v. U. S.*, 91 U. S., 367, that the government of the United States may exercise the right of eminent domain within a state, for the purpose of condemning land for the use of a post-office building, and may, for this purpose, resort to its own courts. In such a case there cannot be a doubt that the post-office building could be erected and used by the government without asking the consent of the state legislature. Such consent would, indeed, be necessary to vest in the United States exclusive jurisdiction over the post-office building and grounds; but it would not be necessary to enable the government to use the property for the purpose for which it was acquired. And so of any other property wanted for a public purpose; the consent of the legislature is not necessary to its acquisition, or to its use; but only to the exclusion of state jurisdiction over the place. That jurisdiction, if allowed to remain, will extend to the punishment of crimes committed against state laws therein, and to the service of state process, but, of course, cannot interfere with the execution of the United States laws, nor with the performance, by United States officers and agents, of the duties devolved upon them.

"In short, cession by a State is only necessary to

extinguish its jurisdiction, in whole or in part, and is not necessary to the use of the land by the United States for public purposes—subject, like all lands within the limits of the Union, to the concurrent jurisdiction of both governments; that of the United States being supreme. The laws of the latter are supreme everywhere, in the States as well as in the territories of the United States; but have exclusive force within the States only in such places as have been ceded by them. The argument based upon the doctrine that the states have the eminent domain or highest dominion in the lands comprised within their limits, and that the United States have no dominion in such lands, cannot avail to frustrate the supremacy given by the constitution to the government of the United States in all matters within the scope of its sovereignty. This is not a matter of words, but of things. If it is necessary that the United States government should have an eminent domain still higher than that of the state, in order that it may fully carry out the objects and purposes of the constitution, then it has it. Whatever may be the necessities or conclusions of theoretical law as to eminent domain or anything else, it must be received as a postulate of the constitution that the government of the United States is invested with full and complete power to execute and carry out its purposes. And as one of these purposes is the regulation of commerce among the several states, and as that involves the needs and ways of intercommunication, it follows that congress may provide for these necessities whether the states co-operate and concur therein or not.

"But, secondly, it is contended that, if the United States can constitutionally take the land of the State as well as that of the citizen for public purposes without consent, it can only do so in the same manner and subject to the same conditions—namely, that of making just compensation. It is urged that the language of the fifth amendment of the constitution is applicable to the case and is imperative. This language is: 'Nor shall private property be taken for public use without just compensation.' It is insisted that the property of the State in lands under its navigable waters is private property and comes strictly within the constitutional provision. It is significantly asked, Can the United States take the State house at Trenton and the surrounding grounds belonging to the State and appro-

priate them to the purposes of a railroad depot, or to any other use of the general government, without compensation? We do not apprehend that the decision of the present case involves or requires a serious answer to this question. The cases are clearly not parallel. The character of the title or ownership by which the State holds the State house is quite different from that by which it holds the land under the navigable waters in and around its territory.

"The information rightly states that, prior to the Revolution, the shore and lands under water of the navigable streams and waters of the province of New Jersey belonged to the king of Great Britain as part of the *jura regalia* of the crown, and devolved to the State by right of conquest. The information does not state, however, what is equally true, that, after the conquest, the said lands were held by the State, as they were by the king, *in trust*, for the public uses of navigation and fishery, and the erection thereon of wharves, piers, light-houses, beacons, and other facilities of navigation and commerce. Being subject to this trust, they were *publici juris;* in other words, they were held for the use of the people at large.

"It is true that to utilize the fisheries, especially those of shellfish, it was necessary to parcel them out to particular operators, and employ the rent or consideration for the benefit of the whole people; but this did not alter the character of the title. The land remained subject to all other public uses as before, especially to those of navigation and commerce, which are always paramount to those of public fisheries. It is also true that portions of the submerged shoals and flats, which really interfered with navigation, and could better subserve the purposes of commerce by being filled up and reclaimed, were disposed of to individuals for that purpose. But neither did these dispositions of useless parts affect the character of the title of the remainder.

"Such being the character of the State's ownership of the land under water—an ownership held, not for the purpose of emolument, but for public use, especially the public use of navigation and commerce—the question arises whether it is a kind of property susceptible of pecuniary compensation, within the meaning of the Constitution. The fifth amendment provides only that private property shall not be taken without

compensation ; making no reference to public property. But if the phrase may have an application broad enough to include all property and ownership, the question would still arise whether the appropriation of a few square feet of the river bottom to the foundation of a bridge which is to be used for the transportation of an extensive commerce in aid and relief of that afforded by the water-way, is at all a diversion of the property from its original public use. It is not so considered when sea-walls, piers, wing-dams and other structures are erected for the purpose of aiding commerce by improving and preserving the navigation. Why should it be deemed such when (without injury to navigation) erections are made for the purpose of aiding and enlarging commerce beyond the capacity of the navigable stream itself, and of all the navigable waters of the country? It is commerce, and not navigation, which is the great object of constitutional care.

"The power to regulate commerce is the basis of the power to regulate navigation, and navigable waters and streams, and these are so completely subject to the control of Congress, as subsidiary to commerce, that it has become usual to call the entire navigable waters of the country the navigable waters of the United States. It matters little whether the United States has or has not the theoretical ownership and dominion in the waters, or the land under them ; it has, what is more, the regulation and control of them for the purposes of commerce. So wide and extensive is the operation of this power that no State can place any obstruction in or upon any navigable waters against the will of Congress, and Congress may summarily remove such obstructions at its pleasure. And all this power is derived from the power 'to regulate commerce.' Is this power stayed when it comes to the question of erecting a bridge for the purposes of commerce across a navigable stream? We think not. We think that the power to regulate commerce between the States extends, not only to the control of the navigable waters of the country, and the lands under them, for the purposes of navigation, but for the purpose of erecting piers, bridges, and all other instrumentalities of commerce which, in the judgment of Congress, may be necessary or expedient.

"Entertaining these views with regard to the power of Congress over the whole subject of the regulation of

commerce among the several States, including the navigable waters of the country, and the lands under the same, as subsidiary to that end, we have no hesitation in declaring our opinion to be that the authority given by the Act of June 16, 1886, to build the bridge in question, and, for that purpose, to erect the necessary piers of such bridge upon the lands under water of Arthur Kill, is valid and constitutional, and does not injuriously affect any property or other rights of the State of New Jersey. This conclusion resolves also the other questions remaining unanswered with regard to the true construction of the act, and the capacity of the defendant The Staten Island Rapid Transit Railroad Company to perform the acts necessary to execute the authority given by Congress."

Similiar Decision in Hawkins Point Light House Case.

A similar question subsequently arose in the Circuit Court for the District of Maryland in the Hawkins Point Light House Case, Chappell vs. Waterworth, 39 Fed. Rep., 77. In that case the plaintiff, by action of ejectment, sought to dispossess the United States of a light-house, built by the United States Light-House Board in the year 1868, under authority of Congress. The light-house was erected upon piles in the waters of the Patapsco River, where the tide ebbs and flows, at a distance of about 210 feet from the shore. The natural depth of the waterway at the channel opposite this point was 16 feet, but it had been deepened to over 27 feet for the purpose of admitting large ocean steamers. This channel had been deepened by the United States authorities and was under their constant supervision. This Hawkins Point light, as located, was required for the safe navigation of this channel. The plaintiff's title was derived from the State of Maryland by grant. He owned all the right and title in the upland and the

shore opposite the light-house, and all the title in the bed of the river which the State could grant, and under the grant of the State by statute of Maryland, he was declared to be entitled to the exclusive right of making improvements into the waters in front of his land, but such improvements could not be made to interfere with the navigation of the stream of water. The plaintiff had never availed himself of the right of improvement out into the water covered by the light-house, but the right to do so was averred to be, and was found by the Circuit Court to be a valuable riparian right. No compensation was made to the plaintiff for the use of the land by the United States; no condemnation of the site was had. The case came before MORRIS, J. His holding was that the plaintiff was not entitled to any compensation. He says, at page 87:

"It is conceded that the Hawkins Point light, as now located, is required for the safe navigation of the channel by ships engaged in foreign commerce. It covers an area of only 27 feet square. The plaintiff has acquired by grant and now owns all the title and right in the upland and the shore opposite this light-house, and in the bed of the river covered by this structure, which the state could grant away, and has the riparian rights specially conferred by the Maryland act of 1862, c. 129, by which it was enacted that 'the proprietor of land bounding on any navigable waters of this state is hereby declared to be entitled to the exclusive right of making improvements into the waters in front of his said land. Such improvements and other accretions as above provided for, shall pass to the successive owners of the land to which they are attached as incident to their respective estates. But no such improvement shall be so made as to interfere with the navigation of the stream of water into which said improvement is made.' In fact, the plaintiff never has availed of this privilege of improving out into the water covered by the light-house, but the right to do so is a valuable riparian right, not to be arbitrarily or

capriciously destroyed. *Yates v. Milwaukee*, 10 Wall, 504. It is, however, a privilege which must be exercised subject to the right of the public to use the river for the great primary and paramount purpose of navigation, and for furnishing the usual and necessary aids to navigation.

"The ruling in *Yates vs. Milwaukee* was that when under legislative permission, or in accordance with his privilege as a riparian owner, the owner of land bounding on a navigable stream has actually made his improvement, and by such improvement that portion of the stream so improved or reclaimed has ceased to be part of the navigable water, and is appropriated to private use, it can then only be taken to improve navigation upon proper compensation being made, as for any other strictly private property. Such was the effect of the mandate of the Supreme Court in that case in reversing the decree below. But while the submerged lands remains a part of the bed of the river it is not private property, in the sense of the fifth amendment to the Federal Constitution. As was declared in *Gilman vs. Philadelphia*, 3 Wall. 725, the navigable waters 'are the public property of the nation, and subject to all the requisite legislation of congress.' In the hands of the state or of the state's grantee the bed of a navigable river remains subject to an *easement of navigation*, which the general government can lawfully enforce, improve, and protect. It is by no means true that any dealing with a navigable stream which impairs the value of the rights of riparian owners gives them a claim for compensation. The contrary doctrine, that, in order to develop the greatest public utility of a water-way, private convenience must often suffer without compensation, has been sanctioned by repeated decisions of the Supreme Court. The following are cases all involving that proposition: *The Blackbird Creek Case*, 2 Pet. 245; *Gilman vs. Philadelphia*, 3 Wall, 713; *Pound vs. Turck*, 95 U. S. 459; *Wisconsin vs. Duluth*, 96 U. S. 379; *South Carolina vs. Georgia*, 93 U. S. 4.

"If it were made apparent to congress that any extension of the plaintiff's present shore line into the river tended to impair the navigability of the stream, or its use as a highway of commerce, congress could authorize the agents of the United States to establish the present shore as the line beyond which no structures of any kind could be extended and the plaintiff would have no claim for compensation. * * * It appears,

therefore, that the private interest granted to the plaintiff in the soil in question was of necessity granted to him subject to the use which the United States is now making, of it in aid of navigation, and that the special plea to plaintiff's action of ejectment sets up a perfect defense to the action. The plaintiff's replication to the defendant's special plea simply avers that, when possession of the submerged land was taken by the United States as in the plea alleged, the plaintiff held title to it under the grants from the state, and still holds said title, and that he has never been paid or tendered any compensation therefor. This, in my opinion, is no answer to the plea, and the defendant's demurrer to it is sustained."

It is difficult to perceive any essential distinction in the relation sustained to the general government by the defendant railway companies, and by the grantee of the State of Maryland in the Hawkins Point Light House Case; or by the State of New Jersey in the case decided in 32 Fed Rep. As owner of the lands under Arthur Kill and as proprietor of the lands under the Patapsco River in the Hawkins Point Case, the ownership was subject to the right of the public in the navigable waters. The defendant railway companies have acquired ownership in their right of way as agencies of the State and national governments, subject to the right of the public to use the said lands for state commerce, interstate commerce, and postal purposes. They do not hold the lands as a private land owner holds his lands, any more than the State of New Jersey did in the one case considered by Justice BRADLEY, or than Chappell did in the case considered by Judge MORRIS. The method in which the public shall utilize the lands for the advancement of interstate commerce or for postal purposes under the decisions, cited *ante*, and many other decisions of this Court, is to be determined by the discretion of Congress in that respect; and Congress has in some cases

defined what these railway companies must do. Thus Congress has provided by Act of June 15, 1866, C 124, 14 Stat. 66 (See 5258 Rev. Stats.) that

"Every railroad company in the United States whose railroad is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its road, boats, bridges and ferries, all passengers, troops, Government supplies, mail, freight and property on their way from any State to another State, and receive compensation therefor, and to connect with roads of other States, so as to form continuous lines for transportation of the same to the place of destination. But this section shall not affect any stipulation between the Government of the United States and any railroad company for transportation or fares without compensation, nor impair or change the conditions imposed by the terms of any act granting lands to any such company to aid in the construction of its road, nor shall it be construed to authorize any railroad company to build any new road or connection with any other road without authority from the State in which such railroad or connection may be proposed. And Congress may at any time alter, amend, or repeal this section."

The subsequent Act of March 3, 1873, c. 252, 17 Stat. 584 (Rev. Stats. Secs, 4386 to 4389), regulating the transportation of livestock over interstate railroads. The Act of May 29, 1884, c. 60, Sec. 6 (23 Stat. 3132) prohibits the transportation by railroads of livestock affected with any contagious or infectious disease. The Act of February 4, 1887, c. 104 (24 Stats, 379), with its amendments of March 2, 1889, c. 382 (25 Stats. 855), February 10, 1891, c. 128 (26 Stats. 743), creates the interstate commerce commission. The Act of October 1, 1882, c. 1063 (24 Stats. 531), provides for arbitration between interstate railroad companies and their employes. The Act of March 2, 1893, c. 196 (27 Stats. 531), requires the use of automatic couplers on railway trains.

Whatever expenditure or expense such compliance with the provisions of the foregoing Acts would require, clearly would not be subject-matter for compensation under the Fifth Amendment of the Constitution of the United States. So with regulations respecting the carrying of the mails and the requirements to comply with the regulations of the departments of the Government—these would not be the subject-matter of compensation under the Fifth Amendment to the Constitution. The compliance with requirements of this character would not be interfering with any property right of the railroad companies. Just as in the New Jersey Case, the construction of the bridge and the planting of the piers upon lands under water in such a way as not to interfere with navigation, the primary and general purpose to which the land was subjected, did not interfere with the general purposes for which the land was burdened, therefore Justice BRADLEY found that it was not the taking of anything for which the State was entitled to compensation; so in the same manner the placing of telegraph lines under the Act of Congress of July 24, 1866, under the navigable waters of the States, in such a way as not to interfere with the navigation of such river, would not be a taking of anything which the State, as proprietor of the land under water, would be entitled to claim compensation for. Undoubtedly cables could be laid under the bridge across the Kill, under the waters, under the Act of July 24, 1866, and subject to its conditions, and Justice BRADLEY'S opinion and reasoning would equally apply to a demand made by the State of New Jersey for compensation for the laying of such cables thereunder. The placing of poles and wires along a railway under the Act of Congress is in advancement of the broad

general purpose for which the right of way is taken, to wit; the carrying of interstate commerce thereon, and for postal and military purposes. It does not interfere with the primary general use for which the railway company holds its right of way, to wit, the carriage of goods and passengers; because such non-interference is the condition upon which they are permitted to be placed thereon, and the railway company, as the owner of the land, occupies precisely the relation to the question of compensation that the State of New Jersey did, or as the private owner under the Patapsco River did in the Hawkins Point Case.

This position does not conflict in any respect with the principles announced by Mr. Justice BREWER in the St. Louis case, cited *ante*, because in that case compensation was allowed to the city because of the fact, as clearly defined in the opinion, that there was a necessary interference to the extent of the exclusive occupation by the poles, with the ordinary travel and use of the highway, and for that, and for that alone, the city was held to be entitled to compensation in that case (see opinion by BREWER, J., p. 14, U. S.; pp. 101, 104).

If it be said that, under the principle announced in *Yates vs. Milwaukee* (10 Wall.), the railway companies have improved the land in question, that the telegraph lines necessarily affect and destroy a portion of these improvements, then the complete answer to the suggestion is that, under the principles announced in that case, all that they would be entitled to would be the extent to which their improvements are affected and diminished in value. It would not in any manner affect the right of Congress to regulate the use of the land for the public benefit.

Conclusion.

It is insisted, therefore, upon the views which have been urged in the foregoing argument, that the Circuit Court, following the decision of the Circuit Court of Appeals, was clearly wrong in holding that the bill filed in this cause by the Western Union Telegraph Company presented no equity upon its face. It fully set forth the rights of the Western Union Telegraph Company under this Act of Congress of July 24, 1866. If it be the opinion of this Court that this act only gives the right to a telegraph company to occupy the right of way of a railway company upon the payment of compensation, the bill fully presented that aspect of the case. If it be the opinion of this Court that such an ascertainment of compensation is the peculiar function of a court of law, and not at all of a court of equity, the bill presented that phase of the question, because it set forth as an exhibit a copy of a petition filed upon the law side of the court, asking that Court to proceed to ascertain and determine the amount of compensation which the telegraph company should pay to the railway company, and asked, as a ground of equitable relief, that, pending that determination, the Court would stay the hand of the defendant railroad company, a legitimate ground of equitable interposition to preserve the property and the *status quo* pending the determination of the legal rights of the parties. This law case then became the principal controversy, and the equitable bill was in aid of the proceeding at law to preserve the rights of the parties pending the determination of their rights at law.

If, on the other hand, this Court, following the long line of authorities cited *ante*, should be of the opinion that the action may legitimately be brought, under the facts presented in the bill, by a suit in equity, and compensation there determined, then the bill presents a full and complete statement of the rights of the parties and the equity arising therefrom under the Act of 1866, and asks the Court to protect its rights and stay the hand of the defendant railway companies while the Court ascertains the amount of compensation which shall be awarded for the continuance of the structures upon the right of way. If the Court should take the view that this case falls within the principles announced by Mr. Justice BRADLEY and followed by Judge MORRIS, equally the bill presents the clear grounds which require the reversal of the decision of the Circuit Court of Appeals and of the decree of the Circuit Court for the District of New Jersey.

Respectfully submitted,

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